Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID LEE SIMMONS,

Petitioner,

v.

PETER DEUEL; STEVEN LERICHE; JOHN R. KROGER; DARIN TWEEDT; STEPHANIE TUTTLE,

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Once a grand jury makes a determination by a "not true bill" that no crime has been committed in the case brought before it, there is no jurisdiction under Oregon law for any prosecution to proceed thereupon in the absence of a court order.

1. The principal issue presented for review is whether a prosecutor violates an individual's constitutional right to procedural and substantive due process under the 14th Amendment by forcing a felony prosecution upon charges found by a state grand jury not to be true.

2. The second question presented for review is whether Petitioner should be entitled to relief under 42 USC ' 1983, et seq., where the state prosecutors violated his 14th Amendment substantive and procedural due process rights, both as to the first prosecution and judgment, and as to a second prosecution of criminal charges upon the same facts.

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In the Supreme Court of the United States

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PETER DEUEL; STEVEN LERICHE; JOHN R. KROGER; DARIN TWEEDT; STEPHANIE TUTTLE,

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PETITION FOR A WRIT OF CERTIORARI

PARTIES

David Simmons is the Petitioner herein, and at the relevant times was a resident of Wasco County, Oregon. Respondent Peter Deuel is the district attorney for Jefferson County and Respondent Steven LeRiche served as a deputy district attorney in that office. Respondent John Kroger is the Attorney General for the State of Oregon[1] and Respondents Stephanie Tuttle and Darin Tweedt served as

[1] On January 5, 2009, John Kroger succeeded Hardy Myers as Attorney General for the State of Oregon and the case caption was amended accordingly pursuant to FRAP 43(c).

assistant attorneys general. No parties are corporations.

BASIS FOR JURISDICTION

Judgment in the Ninth Circuit was entered November 2, 2010. Petitioner filed a petition for panel rehearing November 22, 2010, and for rehearing en banc November 23, 2010, both of which were denied December 29, 2010. This Court has jurisdiction under 28 U.S.C.A. ' 1254(1) and Article III, '2 of the US Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution

Amendment V: When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [Proposed by

Congress in 1789 and ratified by the necessary number of states in 1791]

Amendment XIV, §1: Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Federal Statutes

42 USC §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Oregon Constitution

Article I, §12. Double jeopardy; compulsory self-incrimination. No person shall be put in jeopardy twice for the same offence [sic], nor be compelled in any criminal prosecution to testify against himself.

Article VII, §5 (in pertinent part):

(3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

(4) The district attorney may charge a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

(5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing.

Oregon Revised Statutes

ORS 132.430: Finding against indictment; indorsement "not a true bill." (1) When a person has been held to answer a criminal charge and the indictment in relation thereto is not found "a true bill," it must be indorsed "not a true bill," which indorsement must be signed by the foreman and filed with the clerk of the court, in whose office it shall

remain a public record. In the case of an indictment not found "a true bill" against a person not so held, the same, together with the minutes of the evidence in relation thereto, must be destroyed by the grand jury.

(2) When an indictment indorsed "not a true bill" has been filed with the clerk of the court, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or inquired of by the grand jury unless the court so orders.

STATEMENT OF THE CASE

Under the Oregon Constitution and applicable state statute, once a grand jury refuses to indict upon felony charges presented to it, no further prosecution thereon may proceed, except upon court order in the interests of justice. Petitioner, having just attained majority, was arrested for sex crimes with his girlfriend, a minor. While in jail, the government proceeded to a grand jury, which refused to indict. Notwithstanding the requirements of Oregon law precluding further charges, Respondent prosecutors continued to press six felonies and Petitioner pled guilty to two, and was incarcerated for 30 days. When the conviction was declared a nullity by the court and the prosecutors, after outcry by the grand jury, the prosecutors Leriche and Deuel nonetheless commenced a second criminal prosecution upon the same facts, charging them as misdemeanors.[2]

[2] The prosecutor precipitated a great public outcry. Newspaper editorials decrying Mr. Simmons' two criminal prosecutions include: "A Travesty of Justice in Madras,"

Petitioner's request to enjoin the second prosecution in federal court was denied, and his damage claim under 42 USC §§1983 and 1985 was dismissed on the basis of absolute prosecutorial immunity.

This Court has identified limits to prosecutorial immunity based largely upon the functional analysis articulated in *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), and *Burns* v. *Reed*, 500 U. S. 478 (1991);. both reaffirmed in *Buckley v. Fitzsimmons* 509 US 259 (1993), and is called upon herewith to determine whether under any functional analysis, the prosecutors enjoy absolute tort immunity where they are divested of jurisdiction, seek to avoid tort liability by recharging the same acts as misdemeanors, and retaliating against Petitioner to the point of forcing a plea to an offense for which he could not be convicted by operation of the misdemeanor statute of limitations.

A. Historical and Statutory Background of the Grand Jury Indictment

Felonies are prosecuted by grand jury indictment or information.[3] If the grand jury

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Oregonian, October 30, 2007; "Madras DA Should Dismiss Case," *Bend Bulletin*, November 1, 2007, "Three Wrongs and No Rights," *Oregonian*, March 31, 2008. Numerous stories about Simmons" cases have also been published in the *Eugene Register-Guard*, which have appeared throughout the United States via the Associated Press, as well as on the internet.

[3] All of the original states had their own laws giving defendants a right to insist upon a grand jury charge when being prosecuted for a serious offense, or utilized grand juries as part of the English common law tradition that had been carried over to the colonies and continued after the revolution Beale et al., supra note 1, ' 1.4.

determined the evidence presented did not support an indictment, it returns a finding of "ignoramus" (we ignore it) or "no bill" in response to the proposed charge(s) put before it by the government.[4]

Oregon's Constitution requires that felonies be charged by grand jury indictment unless the defendant waives it; or by information upon preliminary hearing after a showing of probable cause, unless the defendant waives both.[5] Approximately one fourth of the states have imposed statutory limitations on re-submission after a grand jury has returned a no bill or dismissed an indictment containing the same charges, including Oregon.[6]

Oregon's grand jury statute, ORS 132.430, provides in pertinent part:

> When an indictment indorsed "not a true bill" has been filed with the clerk of the court, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or inquired of by the grand jury unless the court so orders.

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[4] Most jurisdictions continue to use the traditional terminology in describing the decision not to indict, though some speak of the grand jury's "dismissal" of proposed charges. , supra note 2, ' 8.6; United States v. Asdrubal-Herrera, 470 F.Supp. 939 (N.D.Ill.1979).156

[5] Oregon Constitution, Article VII, §5, is set forth in pertinent part ante.

[6] Beale, Grand Jury Law and Practice ' 8.6 (2d ed.), fn. 10, with citations to relevant state statutes.

This statute was originally enacted in 1864 and has remained unchanged since,[7] with two cases in the Oregon Supreme Court, addressing its terms, both of which are discussed *infra*.

B. Factual Background[8]

On September 27, 2006, 18-year-old Petitioner David Simmons was arrested on suspicion of rape and sodomy arising from a one-year romantic relationship with his high school sweetheart, which began when he was 17 and she was 14.[9] When confronted by the police with the allegation that he had committed unlawful sex with his girlfriend, Petitioner invoked his constitutional right to counsel

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[7] The 1864 statute provided: "[w]hen an indictment, indorsed 'not a true bill,' has been presented in court and filed, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or enquired of by the grand jury, unless the court so order." General Laws of Oregon, Crim Code, ch VII, 65 (Deady 1845-1864). In 1972, the legislature omitted the reference to presentment in the first clause and updated the spelling and grammar of the section. The meaning of the statute has not changed.

[8] On appeal from the dismissal of Petitioner's Complaint pursuant to Fed Rule Civ Pro 12b(6), this Court may assume as true all of Petitioner's facts, which are derived principally from three sources: (1) The Complaint filed in the District Court below; (2) the exhibits tendered with the Complaint which were attached to the Declaration of Counsel; and (3) from the additional facts alleged in Petitioner's Objections to Magistrate's Finding's and Recommendations dismissing Petitioner's claims (District Court Docket No. 62, at pages 3-15). Finally, the following statement of facts is limited to matters relevant to Respondents' claim of absolute immunity.

[9] Although not appearing in the record, Petitioner was extremely distraught as his girlfriend's mother, in the course of a custody fight, demanded that her Juliet end her relationship with our Romeo.

and to remain silent, whereupon he was arrested and held in custody. During this period the prosecutor ("Leriche") opposed his pleas to be released from jail and to return home to his family, apparently in retaliation for Petitioner's exercise of his right to remain silent.

Petitioner was detained in jail eight days before Leriche finally presented the case to a grand jury, submitting to it a proposed indictment containing six felony counts. The grand jury found against all six counts, endorsing on the indictment "Not a True Bill" (Appendix 10). The grand jury foreman ("Green") handed the Not True Bill directly to Leriche, who signed it and caused it to be filed in the state court proceeding. Notwithstanding the refusal to indict, the state prosecutors continued under color of state law to press all six felony counts.

Leriche continued to oppose Petitioner's release from jail,[10] despite the refusal to indict, and threatened Petitioner that unless he pled guilty to two felonies, with consecutive sentences, he would bring up to 90 additional felony counts against Petitioner -- one for each time Petitioner allegedly had sex with his girlfriend -- and if that happened, Petitioner would never get out of jail.

Leriche thus coerced Petitioner to plead guilty to one count of Rape in the Third Degree and one count of Sodomy in the Third Degree, charges which the grand jury had already dismissed, forcing Petitioner to be branded as a sex offender for life in the local newspaper (Appendix 9). To reward

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[10] Petitioner, being 18 years old, resided with his family, had no income whatsoever, and was found to be indigent. Bail was set far beyond his means.

petitioner for his guilty plea, Leriche finally agreed to Petitioner' release from jail (on a "furlough").[11]

Reunited with his family pending sentencing, Petitioner's in-custody status continued under "house arrest" for nine more days. At sentencing on the dismissed charges on October 19, 2006, the court approved the coerced plea agreement, entered a judgment against Petitioner (Appendix 9) which ordered Petitioner to register as a sex offender for life. Petitioner was taken back into custody and finished serving his 30-day jail sentence.

On Oct. 31, 2006, Petitioner completed his jail sentence on the crimes the grand jury said he did not commit. On the same day, the grand jury foreman, Mr. Green, confronted Leriche complaining that members of the grand jury had recently read in the local newspaper[12] that Petitioner was ordered to register as a sex offender for crimes which the grand jury ruled that Petitioner did not commit. The grand jury foreman asked Leriche: "How is this possible?"

Shocked and embarrassed, Leriche notified his boss, Deuel, and the other involved judicial officers, Kimble and Judge Neilson, to share his "discovery." A private meeting between all involved judicial

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[11] Prior to the change of plea, Kimble told the judge, "It's my understanding that the state would be willing to agree to a furlough for Mr. Simmons if he were to enter a plea today." Again, after the plea was entered, Kimble told the Court, "We're hoping that he'll be furloughed today – that was one of his impetuses for accepting this offer so quickly." Leriche responded by telling the court, "My understanding is that he would be under the supervision of his mother, and I don't object. I told Ms. Kimble and Mr. Simmons that I did not object to it, with the pleas being entered, and that's been done."

[12] See fn. 2, ante.

officers was immediately arranged in the chambers of Judge Neilson. The lawyers and the judge all acknowledged to one another that they had illegally convicted Petitioner and collectively compromised the integrity of the judicial process. Despite this realization, however, these judicial officers instead devised a plan only to privately protect their own self-interests, mitigate their own public embarrassment, and avoid potential tort liability for violating Petitioner's constitutional rights.

As part of the plan, Prosecutor Leriche's retaliatory efforts against Petitioner went from bad to worse, devolving into a more deliberate conspiracy to bring a second prosecution against Petitioner to justify the result of the illegal first prosecution, and to negate Petitioner's damages. Accordingly, on November 30, 2006, Deuel and Leriche initiated a second prosecution for exactly the same alleged crimes as were presented to the grand jury (Appendix 8), but this time charging them as misdemeanors.[13]

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[13] On October 31, 2006, on the record, Judge Neilson told Petitioner: "What transpired here in essence is a nullity. It will be treated as if it never happened in the sense of the law." * * * "Now there is a significant risk that other charges will be brought against you arising from this conduct. You need to understand that. And that being the case, the court has made arrangements for an attorney in the event charges are filed. That attorney is Mr. Alexander. His office is in Bend. I thought that would be best, rather than to reassign it to someone within our two communities, that it be assigned to someone outside the two communities * * * but that's the way we'll go about it. What I will direct the State to do is, once they make their decision with regard to what happens, to communicate with Mr. Alexander, because he stands at the ready on the case, and you need to make contact with Mr. Alexander, too, and we can give you a phone number to do that. Earlier today when I spoke with

C. The Course of the State Court Proceedings:

Petitioner's motion in state court to dismiss the second prosecution on due process and fundamental fairness grounds was denied in a letter ruling by Judge Thompson of May 3, 2007, finding that:

> The six counts that are in the new information mirror image the times and places in the six counts in the indictment..... The not true bill indictment by the grand jury resulted in de facto dismissal of the six felony charges that were filed against Petitioner. The trial level court **was without jurisdiction** to proceed on a plea negotiation and sentencing on any of those six felony charges and any action by the trial level court was **void** because of that. Although it may seem unfair, and may fail the smell test as suggested by [defense counsel], this Court can find no case or constitutional provision that would prohibit the State from trying [Petitioner] on any of the six misdemeanors currently charged in the accusatory instrument." (emphasis added; see Appendix 7)

[the prosecutors], they indicated that there is a significant likelihood that something will be filed, so Mr. Alexander was not available at one o'clock, so I told [Mr. Alexander] that if he wasn't available, we would proceed with an arraignment, should something be filed. * * *"

On March 12, 2007, Petitioner served upon Prosecutors Deuel and Leriche a notice of tort claim pursuant to the Oregon Tort Claims Act, ORS 30.260 to ORS 30.300, for damages caused by their first prosecution. Leriche announced in open court that he and Deuel were disqualifying themselves from participating in the second prosecution based upon their newly discovered "conflict of interest."

On May 7, 2007, the Oregon Attorney General[14] and his Assistant Attorneys General stepped into the role of "Special Prosecutors," to assist Respondents Deuel and Leriche in their failing repair efforts, and to obtain some form of valid conviction against Petitioner by whatever means necessary, fully cognizant of state's potential liability resulting from the first illegal prosecution.

On June 1, 2007, Petitioner sought a Writ of Mandamus in the Oregon Supreme Court, seeking the dismissal of the second prosecution, raising double jeopardy and fundamental fairness as a bar to Petitioner's second prosecution. The Oregon Attorney General filed a response in the Oregon Supreme Court. On July 31, 2007, the Oregon Supreme Court issued an Order Denying Writ of Mandamus without comment.

On August 10, 2007, in furtherance of the effort to salvage some legitimacy to the effort, Respondent Tuttle, on the direction of the Oregon Attorney General, exerted even more pressure on Petitioner by filing an Amended Information (Appendix 6) on behalf of the local prosecutors,

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[14] On January 5, 2009, John Kroger succeeded Hardy Myers as the Attorney General of the State of Oregon. The case caption in the Ninth Circuit was amended by Motion of the Attorney General dated July 10, 2009.

increasing the number of sexual misdemeanors counts in the second prosecution from six to 10. Respondent Tuttle, on the direction of the Oregon Attorney General, also worsened the plea offer, demanding that Petitioner plead guilty to four sexual misdemeanors instead of two.[15] Petitioner rejected Respondents' more onerous plea offer on the grounds of double jeopardy and fundamental fairness.

On March 20, 2008, Petitioner filed his Complaint in the federal district court, seeking *inter alia* to enjoin the second prosecution, which effort was denied, as set forth in Section D, *infra*.

On February 6, 2009, in the second state court criminal proceeding, Petitioner entered into a second "plea bargain" with the prosecutors. Notwithstanding the Oregon statute of limitations for misdemeanors is two years, Petitioner entered a conditional guilty plea in this second prosecution to the completely separate and unrelated crime of misdemeanor harassment (Appendix 5), committed by Petitioner on or about September 26, 2006 (the day before his arrest) by telling his girlfriend that he felt like killing himself.[16] As part of the plea, Petitioner reserved all of his rights to appeal the state court's denial of his motions to dismiss for violation of his substantive and procedural due process rights.

Thus, on February 6, 2009, having obtained a conviction against Petitioner for the crime of Harassment, the state prosecutors finally dismissed all of the misdemeanor sexual charges against Petitioner, for which Petitioner had been previously

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[15] Under Oregon law, this would be the devastating equivalent of two person felonies on his record.

[16] See fn 9, ante.

punished, despite the grand jury's issuance of the Not True Bill.

D. Proceedings in the District Court

On March 20, 2008, Petitioner filed his Complaint in the federal district court pursuant to 42 U.S.C. §§ 1983 and 1985 to enjoin the state court from continuing the second prosecution; and to seek damages against the respondent prosecutors for violating his rights to substantive and procedural due process. The defendants brought various FRCP 12(b)(6) motions claiming judicial and prosecutorial immunity. The matter was referred to Magistrate Judge Paul Papak.

On May 16, 2008, Magistrate Judge Papak refused to consider Petitioner's claims of procedural and substantive due process, and recommended denying Petitioner's request to enjoin the second prosecution. The Finding and Recommendation to deny Petitioner's request to enjoin the state court prosecution was adopted by the District Court Judge.

On September 24, 2008, the Magistrate Judge issued his Findings and Recommendation to dismiss all civil rights claims against the prosecutors (Appendix 4), failing to consider Petitioner's substantive due process claims, and finding the Respondents enjoyed absolutely immunity, both as to the first and second prosecutions, in abject disregard of the law of the forum, Oregon's grand jury statute, ORS 132.430. The Magistrate's Findings and Recommendations were again adopted by the District Court Judge (Appendix 3), and judgment of dismissal rendered thereon, whereupon Petitioner sought relief in the 9th Circuit.

E. Proceedings and Decision in the of the 9th Circuit Court of Appeals

Petitioner appealed to the 9th Circuit, which essentially upheld the finding of the Magistrate Judge in the District court (Appendix 1, 2), despite the Court's concern for the retaliatory conduct of the prosecutors in initiating a second complaint after Petitioner served a sentence upon his plea in the first.[17]

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[17] The following colloquy took place at oral argument in the Ninth Circuit:

JUDGE WARDLAW: What I found somewhat distasteful and couldn't understand was why the DA, after he discovers the error, ok, he should have read it, I'm sure he'll read every indictment that is returned for the rest of his life. But, why whipping up all these additional charges and making them even more...there seems to be a sense of retaliation going on here, and the defendant didn't do anything to create the problem, yet it seems that the charges are for a bunch of other crimes and potential greater penalties. I just don't understand what was going on there.
RENICHE-SMITH: I was not privy to the thought processes. Um, that the DA...(judge interrupts).
JUDGE WARDLAW: Do you think it was the right thing to do, and what do we do with this conditional guilty plea that was extracted?
RENICHE-SMITH: If you're asking if it's something I personally would have chosen...
JUDGE RAWLINSON: We know that you weren't personally involved in it, but we're asking you in terms of looking at this case. How does it affect the analysis that after the error was discovered, there were additional charges brought, and the offer that was made was more, it was a worse offer than before, so how does that affect our analysis? What should we take from that?
RENICHE-SMITH: It does not affect the analysis of the absolute immunity defense which is really what is at issue here.

Petitioner's §1983 action, however, in no way attacks the validity of his conviction for the misdemeanor harassment charge, as asserted by the

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Factually it doesn't look good, and I'd be the first to admit that this doesn't look good. But, also...

JUDGE RAWLINSON: What about substantive due process? That was the one claim that District Court had sympathy for in terms of the Plaintiff. Why isn't this so outrageous that there should be relief because it violates all notions of how the justice system should work.

RENICHE-SMITH: My understanding of the district court's opinion, was that the substantive due process issue was a potentially valid claim in the context of Mr. Simmons' Federal habeas corpus claim, and that claim got abandoned. All the charges against the State Defendants, all the 1983 and 1985 claims against the State Defendants were dismissed, and after there was some confusion at one point as to whether or not Mr. Simmons actually filed an appeal in this Court and it was sent back because not all the claims had been disposed of. So what happened is he wound up dismissing all of his remaining claims including that federal habeas corpus claim and moving forward with this appeal on the 1983 and 1985 claims. And so that one section where the district judge had sympathy for the substantive due process question was in the context of the habeas claim. For the 1983 and 1985 claims, although facially if you take all of the allegations in the complaint as absolutely true, those allegations may indeed shock the conscience and implicate both procedural and substantive due process, the fact of the matter is that absolute prosecutorial applies, and so...

JUDGE RAWLINSON Or does it?

JUDGE WARDLAW: Does it apply to the second charging? Why would that apply, if the second charging was in knowing violation of substantive due process or in retaliation? I mean, I think there's a distinction in the case law between...that involves the scope of prosecutorial absolute immunity, which is, it has to be something in the context of the appropriate exercise of your duties as a prosecutor. And if you're doing something malicious and retaliatory, I think that's crossing the line into beyond the scope of your duties as a prosecutor.

9th Circuit Panel's Memorandum decision. Since Simmons did not request the court to invalidate his criminal conviction in the state court proceeding for the crime of harassment, the matter is fully distinguishable from *Heck v. Humphrey*, 512 U.S. 477 (1994), even though it was beyond the time limit of the statute of limitations and represented the continuing predilection by the government to limit with this plea, its exposure to civil damages for its violation of Petitioner's constitutional rights. The decision of the 9th Circuit was not certified for publication.

REASONS FOR ALLOWING THE WRIT

A. The 9th Circuit Failed to Correctly Apply Oregon Law

1. The Grand Jury Statute was Ignored.

The jurisdictional effect of ORS 132.430(2), is to automatically dismiss all the charges found by the "not true bill", divesting the prosecutor of any authority to continue to prosecute the dismissed charges without a court order, and divesting the court of jurisdiction to continue to prosecute those dismissed crimes. This has been the law in Oregon since the statute was first adopted in 1864, and upheld in its plain meaning since.

In *State v. Turner*, 104 OR 334, 207 P. 602 (1922), the first and until recently, the only case construing the statute, the court held:

> The evident design of the provision was to make effectual the direction of the statute, that when an indictment,

> indorsed 'not a true bill,' has been presented in court and filed, the effect thereof is to dismiss the charge, and to prevent the revival of the charge and its subsequent investigation by a grand jury, unless authorized by an order of the court made upon a showing that adequate reason exists, requiring that the charge be reconsidered in the interest of justice." (104 OR at 340-341)

This construction has not changed, but was affirmed in the next and last analysis of the statute two weeks prior to the filing of the present petition. The Oregon Supreme Court in *State v. Stokes*, ____ OR ____, (filed March 10, 2011, SC No. S057751), held that a grand jury's second indictment for sexual assault eight years after[18] its first refusal to indict was permissible where the resubmission was by court order and based upon two new victims coming forward after the first indictment. The court struggled with dearth of law on the issue of what standards are applicable to the judge's decision to refer the matter to a second grand jury; but after analysis of the history of the statute, the high court affirmed the *Turner* court's understanding of the purpose of the statute: to prevent abusive "perseverance of the prosecutor" and protect the interests of the public. Here, the government's

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[18] The applicable statute of limitations was nine years.

conduct is the very same quintessential mischief the Oregon Supreme Court addressed.

Thus, in Oregon, after a criminal charge has been dismissed following the return of an indictment indorsed, "Not a true bill," the statute places its resubmission to the grand jury in the exclusive control of the court, and the consent of the court is a condition precedent to the authority of the same or a subsequent grand jury to inquire of the charge previously found not true.

Clearly, any action taken in the first prosecution after the Grand Jury's filing of the Not True Bill in this case was completely outside the scope of the prosecutors' authority under these circumstances. Even the Oregon trial court agreed. In Judge Thompson's letter ruling of May 3, 2007,[19] he states:

> The not true bill indictment by the grand jury resulted in de facto dismissal of the six felony charges that were filed against Simmons. The trial level court was without jurisdiction to proceed on a plea negotiation; and sentencing on any of those six felony charges and any action by the trial level court was void because of that.

Petitioner's 1983 case seeks to redress the harm caused by the prosecutor's conduct. If the prosecutor is immune under such circumstances,

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[19] See Appendix, No. 7

there is no check upon the abuse of prosecutorial misconduct.

2. Oregon's Double Jeopardy Statute Barred the Second Prosecution

Oregon Revised Statute §131.515(1) provides that "[n]o person shall be prosecuted twice for the same offense." Article I, §12, of the Oregon Constitution provides, in part, that "[n]o person shall be put in jeopardy twice for the same offence [*sic*]." Or. Rev. Stat. §131.515(3) states: "If a person is prosecuted for an offense consisting of different degrees, the conviction or acquittal resulting therefrom is a bar to a later prosecution for the same offense, for any inferior degree of the offense, for an attempt to commit the offense or for an offense necessarily included therein."

3. Oregon's Constitution Also Barred Second Prosecution.

The Oregon Constitution prohibits consecutive prosecutions for separate statutory violations for *the same offence*, [sic] Article I, §12, "even though each contains different elements and requires proof of different facts," where the several offenses arise out of the "same act or transaction." *State v. Brown*, 262 Or 442, 453, 497 P2d 1191 (1972).[20] A second prosecution is "for the same offense" and is prohibited if "(1) the charges arise out of the same acts or transactions, and (2) the charges could have been tried in the same court, and (3) the prosecutor knew

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[20] Although the Oregon Supreme court in *State v. Hammang*, 271 Or 749, 756 n 4,534 P2d 501 (1975), purported to overrule the *Brown* case, the court later overruled dictum in *Hammang* and explicitly reaffirmed *Brown*. *State v. Knowles*,289 Or 813, 822, 618 P2d 1245 (1980); *State v. Farley*, 301 Or 668, 674, 725 P2d359 (1986).

or reasonably should have known of the facts relevant to the second charge at the time of the original prosecution." *State v. Brown*, 262 Or 442, 458, 497 P2d 1191 (1972).

In this case, the state trial judge found that "The six counts that are in the new information mirror image the times and places in the six counts in the indictment [of the first prosecution]," essentially finding that the two prosecutions arise out of the same acts or transactions. The 9th Circuit, in approving the findings and recommendations of the Magistrate Judge adopted by the District Court, ignored this proposition.

B. The 9th Circuit Failed to Follow Its Own Precedent as to Prosecutorial Immunity

The last en banc decision of the 9th Circuit examining the issue of absolute immunity was in *Ashelman v. Pope*, 793 F.2d 1072 (1986), in which the Court held that "The immunity afforded judges and prosecutors is not absolute. A judge lacks immunity where he acts in the 'clear absence of all jurisdiction,'" i.e., actions taken "without jurisdiction" divest judges and prosecutors of immunity.

Oregon's Revised Statute 132.430 provides that a "Not True Bill," automatically dismisses the charges and further criminal proceedings thereon are precluded; thus protecting citizens from the mischief of unfounded prosecutions. The Circuit Court judge admitted in his letter opinion[21] that the first was without jurisdiction, yet despite this, the prosecutors

[21] See the excerpt of Judge Thompson's letter at Section C, supra, which is published in full as Appendix 7.

proceeded with yet a second criminal prosecution on the same facts.

The 9th Circuit panel memorandum of decision reduced Oregon's grand jury statute to a mere "technicality of local law" and ruled in favor of the application of absolute immunity against Petitioner's claims. This decision not only conflicts with its previous decision(s) on the subject, but endorses the conduct the statute seeks to prevent, both directly as to the first prosecution, and indirectly as to the second.

C. Both Prosecutions Offend Federal Due Process and Double Jeopardy

The Due Process Clause guarantees individuals certain substantive protections. There are two aspects of *substantive due process* which are applicable to the facts of this case: first, the incorporation of the Fifth Amendment prohibition against Double Jeopardy into the Due Process Clause of the 14th Amendment enforceable against the states, *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969); and second, the principle that substantive due process also requires that executive action not be "abusive" or "shock the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

Simply stated, the Double Jeopardy Clause protects the accused from efforts by the state to prosecute him on the same set of facts after a prior conviction or acquittal. *Ashe v Swenson*, 397 U.S. 436, 445 (1970); *cf. United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1970). It protects against three separate, yet sometimes overlapping, categories of re-prosecution: (1) a second prosecution

for the same offense after a conviction; (2) a second prosecution for the same offense after an acquittal; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)

1. **The "Same Offense" was Charged Twice**

Under the Double Jeopardy Clause, the "same offense" has been held to be the same operative set of facts – regardless of how many alternate theories of liability the state can attach to those facts, as this Court recognized over a hundred years ago, stating:

> Where, as in this case, a person has been convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *In re Nielsen*,131 U.S. 176, 188 (1889).

In *Brown v. Ohio*, 432 U.S. 161 (1977), this Court addressed whether a state could avoid the implications of the Double Jeopardy Clause by articulating different charges for the same underlying criminal act in successive prosecutions. The Court firmly rejected any such efforts, stating:

> Because it was designed originally to embody the protection of the common law pleas of former jeopardy, see *United States v. Wilson*, 420 U.S. 332, 339-340 (1975), the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors.

> Where successive prosecutions are at stake, the guarantee serves "a constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion).

That policy protects the accused from attempts by the government to relitigate the facts underlying a prior acquittal, see *Ashe v. Swenson*, 397 U.S. 436 (1970); cf. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), and from attempts to secure additional punishment after a prior conviction and sentence, *see Green v. United States*, 355 U.S. 184, 187-188 (1957); cf. *North Carolina v. Pearce*, *supra*. Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense arising from the same facts.

The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units. *Brown* v. *Ohio*, 432 U.S. at 165-166, 169; *see also Ashe v. Swenson*, 397 U.S. at 447 ("No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do – he refined his presentation in light of the turn of events at the first trial. But this is precisely what the constitutional guarantee forbids.")

2. The Second Prosecution Fails the Blockburger Test

Under the Fifth Amendment's "same elements test," also known as the *Blockburger* test, *see*

Blockburger v. United States, 284 US 299, 52 S.Ct 180, 76 L.Ed 306 (1932) (which was relied upon in the magistrate judge's F&R) (F&R dated May 16, 2008), the inquiry is whether the second prosecution contains an element not contained in the first prosecution; if not, they are "the same offense" and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon*, 509 US 688, 696, 113 S.Ct 2849, 125 L.Ed2d 556 (1993). Consecutive prosecutions are for the same offense under this test if the multiple charges for which the defendant is separately prosecuted have the same elements, that is, the charges in the second prosecution have no elements different from or in addition to those of the charges from the former prosecution.

Here, comparing the charges for which Petitioner was illegally convicted; i.e., Rape in the Third Degree, Or. Rev. Stat. §163.355 and Sodomy in the Third Degree, Or. Rev. Stat. §163.385 (See Counts 2 and 5 of the Not True Bill, Appendix 10), as compared to the charges alleged in the second prosecution, Contributing to the Sexual Delinquency of a Minor, Or. Rev. Stat. §163.435 and Sexual Abuse in the Third Degree, Or. Rev. Stat. §163.415 (See Appendix 8), it is clear that the misdemeanor charges in the second prosecution were necessarily lesser included offenses of the first prosecution. Therefore, even under the *Blockburger* test, the allegations from the second prosecution were necessarily included in the first prosecution; therefore, the second prosecution is barred by the Fifth Amendment. *See United States v. Dixon*, 509 US 688, 696, 113 S.Ct 2849, 125 L.Ed2d 556 (1993).

D. A Vindictive Prosecution Violates the Due Process Clause.

The Government's attempt or threat to 'up the ante' by bringing new or more serious charges in response to the exercise of protected rights violates the due process guarantee." *United States v. Robison*, 644 F.2d 1270, 1273 (9th Cir. 1981).

In the 9th Circuit, a claim of vindictive prosecution is established when the accused makes an initial showing that charges were filed because the accused exercised a statutory, procedural, or constitutional right. *United States v. Gallegos Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982). If the accused makes that showing, then the burden shifts to the prosecution to show that independent reasons or intervening circumstances justified the government's charging decision. *United States v. Montoya*, 45 F.3d 1286, 1299 (9th Cir. 1995).

The accused need not show that the prosecutor acted in bad faith or that he maliciously filed the charging instrument when "it is the appearance of vindictiveness, rather than vindictiveness in fact, which controls." *United States v.Groves*, 571 F.2d 450, 453 (9th Cir. 1978) (emphasis in original). The court looks at the totality of the circumstances surrounding the filing of charges to determine whether there is an appearance of vindictiveness. *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980).

"Evidence indicating a realistic or reasonable likelihood of vindictiveness may give rise to a presumption of vindictiveness on the government's part." *United States v. Garza-Juarez*, 992 F.2d 896,

906 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 724 (1994).

The totality of the circumstances, under the facts of this case, clearly establishes the "appearance of vindictiveness." Here, the prosecutors increased the number of charges against Petitioner, and made a clearly more onerous plea offer. Such conduct establishes a prima facie showing of prosecutorial vindictiveness under *United States v.Montoya, ibid.*

E. Petitioner's § 1983 Action was Entirely Proper.

Section 1983 of Title 42 of the United States Code was originally enacted by Congress as Section 1 of the Ku Klux Klan Act of April 20, 1871. Its purpose was to enforce the provisions of the Fourteenth Amendment to the United States Constitution.[22] Section 1983's primary objective was to provide a means to enforce the provisions of the Fourteenth Amendment. Proponents of the bill argued that the states had no process by which persons could obtain redress for violations of constitutionally guaranteed rights and that federal legislation was the means by which these rights could be enforced.[23] Although the activities of the Klu Klux Klan were the primary evil that the bill was designed to remedy, the bill was not directed solely against the Klan and its members, but also against those persons who, in representing a state, were unable or unwilling to enforce a state law. Thus the bill was intended to protect not only the rights of African Americans who had recently been freed from slavery, but also the rights of all citizens against state sponsored infringement of constitutional rights.[24]

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[22] Ch. 22, 17 Stat.13 (42nd Cong., 1st Sess.). See, also, *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 476 (1961).

[23] Cong. Globe, 42nd Cong., 1st Sess., 374-376 (1871) (Remarks of Congressman Lowe).

[24] Cong. Globe, 42nd Cong., 1st Sess., 335, 374-376.

F. This Matter Presents An Unsettled Question of Law

1. Due Process and Fundamental Fairness Considerations Should Have Barred the Second Prosecution.

A state court prosecution brought in bad faith is an exception to the Younger abstention doctrine. *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). The second prosecution violated Petitioner's rights to due process and fundamental fairness under the facts of this case. Petitioner was jailed on the felony charges, induced to plead guilty to two felony counts, was sentenced, and fully served his 30-day jail sentence, without the process of law to which he was entitled.

To identify what happened to him as "legal nullity," shocks the conscience and offends due process.

Moreover, once the jail sentence had been fully executed in the first prosecution, the government cannot deem it a fiction and pretend it never happened.

2. Substantive Due Process Rights Were Violated by the State Government

This Court has held that "substantive due process" also requires that executive action not be "abusive" or "shock the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833 (1998):

> We have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government,' *Wolff* v. *McDonnell*, 418 U.S. 539, 558

(1974), whether the fault lies in a denial of fundamental procedural fairness, see, *e.g.*, *Fuentes* v. *Shevin,* 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective."

"Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense," "'that it is *a constitution* we are expounding"

Thus, in *Collins* v. *Harker Heights,* for example, we said that the Due Process Clause was intended to prevent government officials "'from abusing [their] power, or employing it as an instrument of oppression.'" *503 U.S. at 126.* To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience. *** See, *e.g.*, *Breithaupt v. Abram, 352 U.S. 432, 435, 1 L.Ed. 2d 448, 77 S.Ct. 408 (1957)* (reiterating that conduct that "'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive due process) *** While the measure of what is conscience-shocking is no calibrated yard stick, it does, as Judge Friendly put it, "point the way." *Johnson v. Glick,* 481 F.2d 1028, 1033 (CA2), cert. denied, 414 U.S. 1033, 94

S.Ct. 462, 38 L.Ed. 2d 324 (1973). *County of Sacramento v. Lewis*, 523 U.S. at 845-847.

CONCLUSION

The issues presented herewith afford this Court the opportunity to address and prevent the further erosion of public confidence in our courts, and maintain the integrity and honor they should enjoy by permitting redress upon constitutionally infirm and egregious conduct complained of herein.

The petition for a writ of certiorari should be granted.

Respectfully submitted:
March 25, 2011

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APPENDIX 1

Order Denying Petition for Rehearing En Banc

FILED
Dec 29 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID LEE SIMMONS, Plaintiff - Appellant,	No. 09-35606
v.	D.C. No. 3:08-cv - 00343-PK
PETER DEUEL; STEVEN LERICHE; JOHN R. KROGER; DARIN TWEEDT; STEPHANIE TUTTLE, Defendants - Appellees	District of Oregon, Portland ORDER

Before: PREGERSON, WARDLA W, and RAWLINSON, Circuit Judges.

The panel voted to deny the Petition for Rehearing and the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Appellant's Petition for Rehearing and Petition for Rehearing En Banc filed on November 23, 2010, are DENIED.

APPENDIX 2

Memorandum Decision of the 9th Circuit

FILED
Nov 02 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID LEE SIMMONS,
Plaintiff - Appellant,

v.

PETER DEUEL; STEVEN LERICHE; JOHN R. KROGER; DARIN TWEEDT; STEPHANIE TUTTLE,
Defendants - Appellees.

No. 09-35606
D.C. No. 3:08-cv-00343-PK

Memorandum*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted July 14, 2010
Portland, Oregon

Before: PREGERSON, WARDLAW and RAWLINSON, Circuit Judges.

Appellant David Lee Simmons challenges the district court's dismissal of his Complaint against

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appellees Peter Deuel, Steven Leriche, John Kroger, Darin Tweedt and Stephanie Tuttle.

1. The district court did not err in dismissing Simmons's claims asserted against Leriche for continuing to prosecute him on charges that had not been returned by a grand jury. We have held that "[a] prosecutor is entitled to absolute immunity for quasi-judicial actions taken *within the scope of his authority*." *McCarthy v. Mayo*, 827 F.2d 1310, 1314 (9th Cir. 1987), *as amended* (citations omitted) (emphasis added). "Authority does not rest on technicalities of local law; the issue is whether the prosecutor is arguably empowered to perform the act." *Id.* (citation and parentheses omitted). Because Leriche was acting within the scope of his authority, he was entitled to absolute immunity.

2. The district court also properly dismissed Simmons's claims pertaining to the second prosecution. We have previously noted that the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) precludes a plaintiff from obtaining relief "in a [42 U.S.C.] § 1983 suit if a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Guerrero v. Gates*, 442 F.3d 697, 703 (9th Cir. 2006) (footnote reference and alteration omitted). Simmons pled guilty to, and was ultimately convicted of, a misdemeanor as a result of the second prosecution. Because Simmons has failed to demonstrate that his

misdemeanor conviction has been invalidated, he is precluded from obtaining relief on his claims. *See id.*

AFFIRMED.

APPENDIX 3

Opinion and Order, District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DAVID LEE SIMMONS,
Plaintiff,

v.

PETER DEUEL et al.,
Defendants.

No. CV 08-343-PK

OPINION AND ORDER

MOSMAN, J.,

On September 24, 2008, Magistrate Judge Papak issued Findings and Recommendation ("F&R") (#86) in the above-captioned case recommending that I GRANT IN PART and DENY IN PART the following motions: State Defendants' Rule 12 Motion to Dismiss (#23); Jones and Jefferson County's Rule 12 Motion to Dismiss (#27); Kimble's Rule 12 Motion to Dismiss (#30); and Alexander's Rule 12 Motion to Dismiss (#32). Plaintiff (#92) and defendants Kimble (#90) and Alexander (#91) filed objections.

DISCUSSION

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge, but retains responsibility for making the final determination. The court is generally required to make a de novo

determination of those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(l)(C). However, the court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the F&R to which no objections are addressed. See Thomas v. Arn, 474 U.S. 140, 149 (1985); United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any of the magistrate judge's F&R. 28 U.S.C. § 636(b)(1)(C).

Upon review, I agree with Judge Papak's recommendation and I ADOPT the F&R (#86) as my own opinion.

IT IS SO ORDERED.

DATED this 18th day of December, 2008.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Court

APPENDIX 4

Findings and Recommendations of Magistrate Judge Papak

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DAVID LEE SIMMONS,
Plaintiff,

v.

PETER DEUEL et al.,
Defendants.

No. CV 08-343-PK

FINDINGS AND
RECOMMENDATION/ORDER

PAPAK, Magistrate Judge

Plaintiff David Simmons filed this action seeking injunctive relief and damages for various alleged civil rights violations and torts arising from a state prosecution on charges a Jefferson County grand jury returned as a not true bill. Defendant Deuel is the district attorney for Jefferson County and Defendant LeRiche serves as a deputy district attorney in that office. Defendant Myers is the Attorney General for the State of Oregon and Defendants Tuttle and Tweedt serve as assistant attorneys general. Defendant Jones is the Jefferson County Sheriff. Defendant Kimble served as a public defender for Simmons in his felony prosecution. Defendant Alexander served as court-appointed attorney for Simmons for a portion of his misdemeanor prosecution.

Defendants' various motions to dismiss for failure to state a claim are now before the court. The

court has jurisdiction pursuant to 28 U .S.C. §§ 1331 and 1367. For the reasons set forth below, defendants' motions to dismiss should be granted.

LEGAL STANDARD

A court should dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) if the complaint does not raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true. *Bell Atl. Corp. v. Twombly*, 127 S. C!. 1955, 1965, 167 L. Ed. 2d 929 (2007). "[C]onclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Associated Gen. Contrs. of Am. v. Metropolitan Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (citation omitted). If a court dismisses for failure to state a claim, the court should grant leave to amend unless it determines that the pleading could not possibly be cured by the allegation of other facts. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

"In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). A court, however, may also "consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned." *Id.* The court "need not accept as true conclusory allegations that are contradicted by documents referred to in the complaint." *Manzarek*, 519 F.3d at 1031.

FACTUAL BACKGROUND

On September 27, 2006, Mr. Simmons was arrested on suspicion of rape and sodomy on allegations arising from his sexual relationship with a 14-year-old girl, who was three years younger than him at the time.[1] (Complaint, #1, ¶13.) The government opposed his release and the court held him in custody. *Id.* at ¶¶14-15.

On October 5, 2006, the Jefferson County District Attorney's Office (Defendants Deuel and LeRiche) presented a proposed indictment to the Jefferson County Grand Jury. The proposed indictment alleged six felonies - four counts of Rape in the Third Degree and two counts of Sodomy in the Third Degree. (Def's Mot. to Dismiss, #23, Ex. 102.) The grand jury returned a not true bill on all six counts. (Complaint ¶16.) Under Oregon law, a grand jury's return of a not true bill dismisses the charges. Or. Rev. Stat. § 132.430. LeRiche, however, signed and filed the indictment without reading it. (Complaint ¶16.)

On October 6, 2006, the court attempted to arraign Simmons on the not true bill. *Id.* at ¶18. The electronic communication system between the Jefferson County Jail and the courtroom was not working. As a result, Simmons could not communicate with the courtroom, including his court-appointed counsel, Defendant Kimble. Kimble attempted to waive reading of the indictment at the hearing. The court, however, did not request that Simmons be transported and instead indicated on the

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[1] Mr. Simmons turned 18 years old during the relationship.

record that the hearing could not proceed due to the communication problem and would be rescheduled. *Id.* at ¶19.

On October 10, 2006, Deputy District Attorney LeRiche sent a plea offer to Kimble. *Id.* At ¶20. The plea offer provided that, in exchange for Simmons' guilty plea on one count each of rape and sodomy, the government would dismiss the remaining four counts and recommend a 30-day sentence in jail, among other terms. (Def's Mot. to Dismiss, Ex. 103.) In addition, the government agreed to "furlough" Simmons from jail pending sentencing. (Complaint at ¶21.)

Simmons pled guilty as agreed. *Id.* Kimble apparently had not noticed that the grand jury returned the indictment as a not true bill. The court, apparently also unaware of the not true bill, released Simmons to house arrest at his mother's residence and directed him to return to court for sentencing. *Id.*

Simmons appeared for sentencing as ordered. *Id.* At ¶22. The court adopted the plea bargain and sentenced Simmons to five years of probation on various terms, including sex offender registration, and to one month in jail, with credit for time served. Simmons completed his 30-day sentence on October 31,2006, and was released from custody. *Id.* at ¶23.

Also on October 31, the presiding grand juror, prompted by a local newspaper article on Simmons' conviction, informed LeRiche that the grand jury had returned a not true bill. *Id.* LeRiche notified Deuel, Kimble and the court that the case had been

improperly prosecuted. *Id.* At ¶24. The court met with Deuel, LeRiche and Kimble to discuss the matter. At the meeting, Kimble acknowledged that her error disqualified her from further representation for Simmons. *Id.* at ¶25. The court contacted Defendant Brendon Alexander to ask him to serve as Simmons' new court-appointed defense counsel. *Id.* at ¶26.

After the meeting, Kimble notified Simmons of the error and gave him a letter that stated that he might have a claim against her as a result of it. *Id.* She also indicated that the charges would be dismissed at a hearing later that day and that the State intended to bring new misdemeanor charges regarding the same subject matter. (Richkind Dec., #4, Ex. 15.)

Despite Kimble's possible conflict of interest as a result of her error, Kimble represented Simmons at the hearing to vacate the prior judgment of conviction. (Complaint at ¶30.) At the hearing, in open court, Kimble indicated that Simmons stipulated to the motion to vacate. The court explained to Simmons that other charges could be brought against him and that Mr. Alexander was on hand to serve as his court-appointed lawyer in that instance.

The court then entered an order declaring all proceedings that followed the not true bill "null and void." (Defs. Mot. to Dismiss, Ex. 105.) The order indicated that "the parties stipulate and move that the Judgments of Convictions and Sentences be vacated... that the Defendants' [sic] pleas be

withdrawn, and a judgment dismissing the indictment be signed and entered by the Court."

On November 30, 2006, the District Attorney's office filed new charges in an information alleging six misdemeanor counts, including four counts of Contributing to the Sexual Delinquency of a Minor and two counts of Sexual Abuse in the Third Degree, based on the same incidents that led to the earlier, void felony conviction. (Defs. Mot. to Dismiss, Ex. 106.) Alexander, serving as Simmons' court-appointed counsel, attempted to negotiate a plea deal before he informed Simmons of the new charges. (Complaint at ¶¶34-36.) Simmons rejected the plea offer and obtained new counsel. *Id.* at '1[38. His new counsel asked the judges involved in Simmons' earlier felony prosecution to recuse themselves from the misdemeanor prosecution and the judges agreed. *Id.* at ¶39.

Simmons moved to dismiss the charges on grounds that they violated state law and his right to be free from double jeopardy secured under the Oregon and U.S. Constitutions. (Defs. Mot. to Dismiss, Ex. 107.) The court denied the motion in a letter opinion. *Id.* at Ex. 110. Simmons petitioned the Oregon Supreme Court for a writ of mandamus. *Id.* at Ex. 1ll. The Oregon Supreme Court denied the writ without comment. *Id.* at 113.

Defendants LeRiche and Deuel received a state tort claim notice from Simmons regarding the state claims at issue in the present case. (Complaint '1[45.) As a result of the potential conflict of interest engendered by the notice, they removed themselves from the case. The Oregon Attorney General's office

appointed new counsel, Defendant Tuttle. *Id.* at ¶48. Tuttle informed Simmons of the government's intent to amend the information and again extended a plea offer. *Id.* At ¶53. Simmons did not accept the offer.

The state filed a motion in limine to exclude all evidence regarding Simmons' previous plea and sentence. *Id.* At ¶56. The court granted the motion over Simmons' objection. *Id.* At ¶60. Defendant Tweedt assumed responsibility for the prosecution in November 2007. *Id.* ¶57.

Simmons is not in physical custody pending his criminal trial. Rather, Simmons signed a conditional release agreement, which required that he: 1) not have any contact with the victim, 2) report for trial and 3) acknowledge that a violation of those conditions would subject him to arrest and prosecution. *Id.* at ¶42. Simmons currently lives in Texas and has also waived extradition. *Id.* at ¶45

While his criminal prosecution in state court was still pending, Simmons filed suit in federal court and sought a preliminary injunction to halt the state prosecution against him. This court's Findings and Recommendation on Simmons' Motion for Preliminary Injunction treated his request for injunction solely as a federal habeas claim. It recommended denying his request for an injunction because: 1) the prosecution did not violate Simmons' federal constitutional right to be free from double jeopardy and 2) the court should abstain from Simmons' substantive due process claim for relief because he failed to exhaust state remedies. It further recommended dismissal of Simmons' claims for injunctive relief under 42 U.S.C. §§ 1983 and 1985

and denial of his federal habeas petition. I abstained, however, from Simmons' substantive and procedural due process habeas claims alleging vindictive prosecution. Judge Mosman's Opinion and Order adopted the reasoning in the Findings and Recommendation, but held that the ruling only extended to the denial of the motion for preliminary injunction. Therefore, all of Simmons' claims remain.

DISCUSSION

I. Federal Claims Under 42 U.S.C. §§ 1983 and 1985

Simmons' federal claims embrace several theories of relief alleged against multiple defendants. Simmons' First Claim for Relief alleges that both the former felony prosecution and the current misdemeanor prosecution violate his rights to procedural and substantive due process. He also asserts that the current misdemeanor prosecution violates his right to petition the government for redress of grievances under the First and Fourteenth Amendments and his right to be free from double jeopardy under the Fifth and Fourteenth Amendments and Oregon law. He asserts the First Claim for Relief against Deuel, LeRiche, Myers, Tuttle and Tweedt. Simmons' Second Claim for Relief alleges a conspiracy to initiate the current misdemeanor prosecution and thereby deprive him of his First, Sixth and Fourteenth Amendment rights. He asserts that claim against Deuel, LeRiche, Myers, Tuttle, Tweedt, the State of Oregon, Kimble and Alexander. Finally, Simmons' Third Claim for Relief alleges that Deuel, LeRiche, the State of Oregon, Kimble, Sheriff Jones and Jefferson County violated his Sixth Amendment right to counsel and

Fourteenth Amendment right to procedural and substantive due process when they failed to provide adequate communication at his attempted October 6 arraignment.

A. Abstention Doctrines

1. The *Heck* Doctrine

"Habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim comes within the literal terms of § 1983." *Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973». The Ninth Circuit has held that *Heck* applies equally to claims brought under §§ 1983 and 1985. *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1098 n.4 (9th Cir. 2004). Thus, actions for injunctive relief or damages under §§ 1983 and 1985 do not lie if the plaintiff must demonstrate the invalidity of state-imposed confinement before he is entitled to that relief. *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005). The government bears the burden to prove that plaintiff's success in a §§ 1983 or 1985 action would necessarily imply the invalidity of her conviction. *Smith v. City of Hemet*, 394 F.3d 689, 699 n.5 (9th Cir. 2005). If the government meets that burden, the court must dismiss the complaint unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Heck* 512 U.S. at 487.

The *Heck* rule, however, only applies to "an outstanding criminal judgment." *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct. 1091, 1098 (2007). The Court

rejected the idea that "an action which would impugn an anticipated future conviction cannot be brought until that conviction occurs and is set aside because that idea "goes well beyond Heck." *Id.* Rather, when a plaintiff's claim relates "to rulings that likely will be made in a pending ... criminal trial," the district court has the power to stay the civil action and the exercise of that power is "in accord with common practice." *Id.; see also Curry v. Hennessey*, No. 07-1757,2007 U.S. Dist. LEXIS 37667, at * 4-6 (May 10, 2007) (applying *Wallace* to pre-trial detainee § 1983 action for damages and holding that proceedings should be stayed).

Here, Simmons asserts state and federal constitutional claims under 42 U.S.C. §§ 1983 and 1985 and seeks both injunctive relief and damages. Specifically, Simmons seeks to enjoin the pending misdemeanor prosecution. If Simmons prevails in his request for preliminary injunction, that result would invalidate the state's custody of him under the conditional release agreement. Therefore, his claims for injunctive relief under §§ 1983 and 1985 should be dismissed with prejudice.

Defendants argue that, because Simmons has not been convicted, *Heck* bars all his claims because the criminal prosecution is ongoing. Defendants are wrong. *Heck* does not bar Simmons' claims that arise from the former felony prosecution and conviction because the state court already declared that conviction null and void. Moreover, *Heck* does not bar Simmons' claims related to the current misdemeanor prosecution, it merely requires that the court stay proceedings on those claims. Therefore, the court should stay the proceedings on the claims that relate

to the current prosecution unless those claims are vulnerable to dismissal on other grounds.

2. *Younger* Abstention

Under *Younger v. Harris*, a state criminal defendant cannot assert ancillary challenges to an ongoing state criminal proceeding in federal court except under special circumstances. 401 U.S. 37,44-55 (1971). "Special circumstances" warranting federal intervention in a pending state prosecution include cases "of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown." *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

Younger principles apply to claims that seek to enjoin state court proceedings as well as claims for damages based on constitutional challenges that a plaintiff can assert in a pending state criminal proceeding. *Gilbertson v. Albright*, 381 F.3d 965, 982 (9th Cir. 2004) (en banc); *Mann v. Jett*, 781 F .2d 1448 (9th Cir. 1986) (per curiam) (applying *Younger* abstention to federal § 1983 action for declaratory relief and money damages filed after criminal prosecution commenced in state court). Constitutional challenges implicate *Younger* because, to determine whether the plaintiff is entitled to damages, or whether the federal defendant is entitled to qualified immunity, the district court must first decide whether a constitutional violation occurred. *Gilbertson*, 381 F.3d at 979 (citing *Saucier v. Katz*, 533 U.S. 194 (2001) (holding that qualified immunity requires that the court initially determine whether

the conduct complained of violates the Constitution)). That decision would, in turn, "put the federal court in the position of prematurely or unnecessarily deciding a question of federal constitutional law." *Id.* at 980.

Here, portions of Simmons' First and Second Claims for Relief are vulnerable to *Younger* abstention because he can assert them in his pending misdemeanor prosecution. Simmons' First Claim for Relief alleges that the misdemeanor prosecution violates his rights under the First, Fifth and Fourteenth Amendments and Oregon law. In addition, his Second Claim for Relief alleges a conspiracy to initiate the current misdemeanor prosecution and thereby deprive him of his First, Sixth and Fourteenth Amendment rights. Under a *Younger* exception for pre-trial habeas petitions that raise a colorable claim of double jeopardy, however, the court reached the merits of Simmons' federal constitutional double jeopardy claim in its ruling on his motion for preliminary injunction.[2] *See Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992).

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[2] My ruling did not address Simmons' claim that the current prosecution violates his due process right to be free from double jeopardy under state law. Simmons has already presented that claim in a motion to dismiss the criminal prosecution in the state trial court, and in a writ of mandamus filed in the Oregon Court of Appeals and petitioned to the Oregon Supreme Court. Thus, that claim may not implicate *Younger*. It does, however, implicate *Heck* because it could impugn a future criminal conviction. In any case, I do not reach the merits of his state double jeopardy claim because, as set forth below, I find that prosecutorial immunity applies to Simmons' First Claim for Relief. As a result, I leave open whether the state constitutional provisions and laws governing double jeopardy create a liberty

Simmons contends that the special circumstances exception to *Younger* applies because he will suffer irreparable injury if the state continues to pursue its misdemeanor prosecution against him.[3] Simmons, however, has no claims for injunctive relief under §§ 1983 and 1985 because, as noted above, his federal habeas corpus action is the proper avenue for those claims. The special circumstances exception to *Younger* does not apply to Simmons' §§ 1983 and 1985 claims for damages because those claims do not involve irreparable injury. *See Younger*, 401 U.S. at 46 ("[T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" ... the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.").

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interest protected by the U.S. Constitution or federal law. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003) ("Section 1983 is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred.") (internal citations omitted). In addition, I do not reach defendants' claim preclusion and issue preclusion defense.

[3] Simmons also cites *Mitchum v. Foster*, 407 U.S. 225 (1972), in support of his contention that the court should not apply *Younger* abstention. In *Mitchum*, the Court held that 42 U.S.C. § 1983 constituted an exception to the Anti-Injunction Act because it expressly authorized federal courts to enjoin state court proceedings. *Id.* at 242. The Court emphasized, however, that its ruling did "not question or quality in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Id.* at 243; *see also Anderson v. Nemetz*, 474 F.2d 814, 818 (9th Cir. 1973) (recognizing that *Mitchum* did not preclude *Younger* abstention in actions brought under 42 U.S.C. § 1983).

Where *Younger* abstention applies and the plaintiff has not exhausted appellate remedies in an action for money damages, the district court should "stay its hand until state proceedings are completed." *Gilbertson*, 381 F.3d at 969. A state criminal proceeding remains pending for *Younger* purposes until the plaintiff has "exhausted his state appellate remedies." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609-11 (1975). However, *Gilbertson* does "not require a stay for damages claims that would be dismissed as ... meritless on the pleadings." *Equity Lifestyle Props. v. County of San Luis Obispo*, 505 F.3d 860, 873 (9th Cir. 2007); see also *Gilbertson*, 381 F.3d at 982 n.18. As a result, I reach defendants' arguments regarding the merits of Simmons' First and Second Claims for Relief in the sections that follow.

3. Summary of Application of *Heck* and *Younger*

Simmons' §§ 1983 and 1985 claims for injunctive relief should be dismissed because federal habeas provides his sole avenue for relief from the pre-trial conditional release agreement. This ruling requires that the §§ 1983 and 1985 claims against the State of Oregon be dismissed with prejudice since Simmons appears to seek only injunctive relief from the state.[4] Moreover, because Simmons contends that

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[4] The claims against the State of Oregon are, at any rate, foreclosed by the Eleventh Amendment. *Ky. v. Graham*, 473 U.S. 159, 167 n.14 (1985) ("Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, ... a State cannot be sued directly in its own name regardless of the relief sought.").

he named Judge Thompson in the complaint solely to enjoin the misdemeanor prosecution, to the extent he has asserted those claims against Judge Thompson, those claims should also be dismissed with prejudice.[5]

Simmons' §§ 1983 and 1985 claims for damages in his First and Second Claims for Relief implicate *Heck* and *Younger* to the extent that they attack the current misdemeanor prosecution against him in state court. His Third Claim for Relief does not implicate those doctrines because it only addresses claims that arose in the prior, voided felony proceeding and conviction. Therefore, I must stay the proceedings on portions of Simmons' First and Second Claims for Relief unless I decide that those claims are meritless on the pleadings without reaching the constitutional issues they raise.

B. Immunities

Courts have recognized two types of immunity from suit under 42 U.S.C. § 1983: qualified immunity and absolute immunity. Qualified immunity shields officials from suits for damages when their conduct either does not violate a constitutional right or violates a constitutional right that was not "clearly established" on the date of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201-202 (2001). Absolute immunity, on the other hand, acts as a complete bar to liability. Courts presume "that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-487 (1991).

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[5] As a result, I do not reach Judge Thompson's judicial immunity defense.

An official seeking absolute immunity bears the burden to prove that it is warranted. *Id.* at 486. In determining immunity, courts accept the allegations of the complaint as true. *Kalina v. Fletcher*, 522 U.S. 118, 122 (1997).

1. Prosecutorial Immunity

The prosecutor defendants (Deuel, LeRiche, Myers, Tuttle and Tweedt) assert that they are entitled to prosecutorial immunity because Simmons seeks to hold them liable for their duties and charging decisions as prosecutors.[6] A prosecutor is entitled to absolute immunity under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976). The Supreme Court extended absolute immunity to prosecutorial actions because public trust in the prosecutor's office would suffer if the potential for liability constrained prosecutors' decisions *Id.* at 424-25. In addition, the Court reasoned that prosecutors require "wide discretion in the conduct of trial and the presentation of evidence" and that suits for damages would divert their energy "from the pressing duty of enforcing criminal law." *Id.*

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[6] The state defendants' argument correctly presumes that Simmons sues them in their individual, or personal, capacities. The Ninth Circuit has held that a §1983 suit for damages against state actors necessarily implies a suit against the defendants in their personal capacities. *See Cerrato v. San Francisco Community College Dist.*, 26 F.3d 968, 973 n.16 (9th Cir. 1994); *Demery v. Kupperman*, 735 F.2d 1139, 1146 (9th Cir. 1984). Moreover, an officer sued in an official capacity cannot assert personal immunities: he or she may only assert forms of immunity that the state itself possesses, such as Eleventh Amendment immunity. *Graham*, 473 U.S. at 167.

at 425-26. On the other hand, when a prosecutor performs acts that constitute investigatory or administrative functions, only qualified immunity applies. *Id.* at 430. Thus, courts determine immunity by "examin[ing] the nature of the function performed, not the identity of the actor who performed it." *Kalina*, 522 U.S. at 125 (internal citation omitted).

Prosecutorial immunity extends to actions that are part of the judicial process whether or not the act violated the civil plaintiff's constitutional rights.[7] *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). Thus, prosecutors are absolutely immune from liability for a decision to initiate a particular prosecution. *Imbler*, 424 U.S. at 431, & n.34. The Ninth Circuit has interpreted *Imbler* to support absolute prosecutorial immunity even when a plaintiff alleges that the prosecutor went forward with a prosecution he believed was not supported by probable cause. *Milstein v. Cooley*, 257 F.3d 1004, 1009 n.3 (9th Cir. 2001) (discussing *Imbler*, 424 U.S. at 416). *See also Broam*, 320 F.3d at 1030 (prosecutor entitled to absolute immunity despite fact that his decision not to turn over exculpatory material before, during, or after conviction violated plaintiffs right to due process). Moreover, supervisory defendants are entitled to absolute immunity for conduct closely related to prosecutorial decisions in the plaintiffs case. *Goldstein v. City of Long Beach*, 481 F.3d 1170,

[7] In deciding whether absolute immunity applies, the court does not reach whether a constitutional violation took place in the current criminal prosecution. Therefore, this court can reach the immunity questions at issue here without running afoul of *Heck or Younger*.

1174 (9th Cir. 2007) *cert. granted*, 128 S. Ct. 1872 (Sept. 5, 2008).

On the other hand, the Ninth Circuit recently held, in *Goldstein*, that supervisory decisions that relate only to the general management of a district attorney's office, such as employee training, are administrative and therefore not entitled to immunity. *Id.* at 1176. In addition, the Ninth Circuit indicated in dicta that "it may be possible for an act to be prosecutorial in function but administrative in form." *Id.* at 1175. Although the Supreme Court recently granted certiorari in *Goldstein*, it remains controlling precedent until the Court says otherwise.

Here, the First Claim for Relief alleges that the prosecutor defendants, Deuel, LeRiche, Myers, Tuttle and Tweedt, violated his rights by 1) "re-prosecuting him after his term of confinement in the former prosecution;" 2) "prosecuting him on an non-existent indictment;" and 3) by "conducting a sham and vindictive prosecution" in the current criminal case. The Second Claim for Relief alleges that Deuel and LeRiche conspired with other defendants to violate his rights by 1) conducting "a sham and vindictive prosecution" and 2) "failing to ensure that Kimble was qualified to continue as counsel at the vacatur hearing." Finally, the Third Claim for Relief alleges that Deuel and LeRiche violated his rights by "failing to provide him with adequate communications" at his attempted October 6 arraignment.

Prosecutorial immunity applies to the allegations against Myers, Tuttle and Tweedt because Simmons seeks to hold them liable for their decision to pursue the current misdemeanor

prosecution against him. No set of facts would entitle Simmons to the relief he seeks from them. The First and Second Claims for Relief against Myers, Tuttle and Tweedt should therefore be dismissed with prejudice.

Prosecutorial immunity also extends to the allegations against Deuel and Leriche because their acts were undertaken as part of the judicial process or involved a decision to initiate criminal proceedings. Two of Simmons' allegations seek to hold Deuel and Leriche responsible for their actions at the attempted arraignment and the vacatur hearing, both of which were judicial proceedings in the criminal case. The remaining allegations seek to hold them responsible for their decision to initiate the current misdemeanor prosecution and for their earlier decision to prosecute Simmons after the grand jury returned a not true bill.

Although Simmons insists that LeRiche's signing of the indictment constitutes an administrative task, I find that argument unpersuasive. The Ninth Circuit has indicated that prosecutorial immunity extends to acts that are part of the judicial process. The signing of the indictment constitutes such an act. Moreover, this court would produce an absurd result if it decided that signing the indictment was administrative: a prosecutor would not be immune for negligently pursuing a prosecution based on an administrative error but would enjoy absolute immunity for intentionally proceeding without probable cause.

Simmons' §§ 1983 and 1985 claims against Deuel and LeRiche should be dismissed. The court

should dismiss the §§ 1983 and 1985 claims against LeRiche with prejudice, because no set of facts would entitle Simmons to relief against him. The First and Third Claims for Relief against Deuel, however, should be dismissed with leave to amend because the constitutional harms that Simmons alleges in those claims could be attributable to general management failures within the Jefferson County District Attorney's Office and Deuel, as the district attorney, could be held responsible for those failures.

2. Quasi-Judicial Immunity of Defendant Jones

Courts afford quasi-judicial immunity to individuals who execute court orders because they are "integral parts of the judicial process." *Coverdell v. Dep't of Soc. & Health Servs*, 834 F.2d 758, 765 (9th Cir. 1987) (citing *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983). Under quasijudicial immunity, individuals are absolutely immune from liability for damages in civil rights actions challenging conduct authorized by a court order. *Id.* at 764. Similarly, the Ninth Circuit has held that a jailor cannot be held liable for failing to release a prisoner if he was acting under the authority of a writ or warrant. *Hoffman v. Halden*, 268 F.2d 280, 300 (9th Cir. 1959) *overruled on other grounds by Cohen v. Norris*, 300 F. 2d 24, 29-30 (1962).

Here, Simmons' Third Claim for Relief alleges that Sheriff Jones and Jefferson County, along with other defendants, violated his right to procedural and substantive due process and his right to counsel by failing to provide adequate communication at the attempted October 6 arraignment. Quasi-judicial

immunity applies to the extent that Simmons seeks to hold Jones responsible for the scheduling of the arraignment, the decision that it could take place via electronic submission, and the decision that the arraignment be rescheduled rather than have Simmons brought to the courtroom. The presiding judge made those decisions. The real thrust of Simmons' claim, however, is that Jones was responsible for maintaining the electronic communication system and failed to do so, resulting in a violation of Simmons' constitutional rights. Jones has not demonstrated that he is entitled to quasi-judicial immunity on this claim because nothing indicates that a court order governed the maintenance of the communication system.

3. Summary of Immunities Defenses

Although several defendants are entitled to absolute immunity, portions of Simmons' §§ 1983 and 1985 claims remain. Prosecutorial immunity extends to all of his claims against Deuel, LeRiche, Myers, Tuttle and Tweedt because he seeks to hold them liable for acts that occurred as part of the judicial process. The §§ 1983 and 1985 claims against LeRiche, Myers, Tuttle and Tweedt should be dismissed with prejudice, while the First and Third Claim for Relief against Deuel should be dismissed with leave to amend. Sheriff Jones is not entitled to qualified immunity from Simmons' Third Claim for Relief to the extent that it alleges that Jones failed to provide an adequate communication system for Simmons' attempted October 6 arraignment.

As a result of these rulings, Simmons' First Claim for Relief should be dismissed in its entirety.

In Simmons' Second Claim, only the allegations against Kimble and Alexander remain. In Simmons' Third Claim for Relief, the allegations against Jones, Jefferson County, Kimble and Alexander remain.

C. Merits of the Remaining §§ 1983 and 1985 Claims

1. Second Claim for Relief- Violation of 42 U .S.C. § 1985

To state a claim for a violation of § 1985(3), the plaintiff must allege four elements: (1) a conspiracy; (2) to deprive any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) resulting in an injury to the plaintiffs person, property, rights or privileges. *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 828-829 (1983). Under the second element, the conspiracy must be motivated by a "class-based, invidiously discriminatory animus." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). To meet that element, the plaintiff must show "either that the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection." *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985).

The Supreme Court has declined to hold that the poor constitute a suspect class. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) ("We have previously rejected the suggestion that statutes

having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny."); *Ortwein v. Schwab*, 410 U.S. 656,660 (1973) (state appellate court filing fee did not violate equal protection). Moreover, the Ninth Circuit has held that a plaintiff's contention that "he was treated less favorably as an indigent than he would have been had he been affluent enough to retain his own lawyer does not ... make out a proper class-based 1985(3) claim." *Glover v. Tower*, 700 F.2d 556, 558 (9th Cir. 1983).

Here, Simmons argues that he is a member of a class of indigent individuals who cannot afford criminal defense counsel and that the Supreme Court extended protection to that class when it held the Sixth Amendment guarantees the right to counsel in criminal proceedings. *See Gideon v. Wainwright*, 372 U.S. 335, 340 (1963). Simmons' argument, however, is foreclosed by the Ninth Circuit's decision in *Glover*. Therefore, Simmons' § 1985 claim should be dismissed with prejudice because he is unable to allege a conspiracy motivated by a class-based discriminatory animus.

2. Third Claim for Relief - Violation of 42 U.S.C. § 1983

A plaintiff who asserts a § 1983 claim must allege: "(1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law." *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). Here, Simmons' Third Claim for Relief alleges that Kimble, Jones and Jefferson County, along with other

defendants, violated his right to procedural and substantive due process and his right to counsel by failing to provide adequate communication at the attempted October 6 arraignment. Kimble, Jones and Jefferson County each attack the merits of Simmons' allegations on separate grounds, as set forth below.

a. State Action (Kimble)

Court-appointed counsel does not generally act under color of state law when representing a client in the lawyer's traditional adversarial role. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). However, a plaintiff may state a claim under §1983 if the plaintiff can plead that the public defender actually conspired with state officials. *Tower v. Glover*, 467 U.S. 914,923, (1984). On the other hand, conclusory allegations of a conspiracy, without more, are insufficient to state a claim against court-appointed counsel. *Simmons v. Sacramento County Super. Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003). An allegation that a public defender provided inadequate representation also does not suffice. *Miranda v. Clark County*, 319 F.3d 465, 469 (9th Cir. 2003).

Here, Simmons has failed to allege that Kimble conspired to deprive him of his rights. Simmons alleges that Kimble did not read the indictment before she tried to waive reading it at the attempted October 6 arraignment. Thus, under the facts alleged, Kimble could not know that foregoing a reading of the indictment would harm him. Moreover, nothing indicates that Kimble knew beforehand that the electronic communication system was not working. A conspiracy requires a meeting of the minds. Simmons' allegations, however, merely suggest a confluence of

accidents. Therefore, the § 1983 claim against Kimble should be dismissed.

Upon amendment, Simmons would need to allege, at minimum, that Kimble knew the indictment was invalid before the October 6 arraignment. The complaint, however, directly contradicts that allegation, as it indicates she did not know until after Simmons served his sentence that the grand jury returned the indictment as a not true bill. As a result, the Third Claim for Relief against Kimble should be dismissed with prejudice.[8]

b. Constitutional Deprivation (Sheriff Jones)

The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. A plaintiff may assert three kinds of § 1983 claims under the Due Process Clause of the Fourteenth Amendment. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). First, a plaintiff may bring suit under § 1983 for state officials' deprivation of his rights secured by

[8] At oral argument, counsel for Simmons asserted new allegations against Kimble, including that, after she discovered her error, she conspired with the district attorney's office to hatch the current misdemeanor prosecution. Those allegations are not embraced by Simmons' current Third Claim for Relief. Simmons, however, is free to amend his complaint to state a new claim against Kimble based on the allegations he made during oral argument. Such a claim, however, would be subject to stay under *Heck* and *Younger*, and potentially other affirmative defenses.

the Bill of Rights and applied to the states through the Fourteenth Amendment. *See id.* Second, a plaintiff may bring a procedural due process claim for a deprivation of a constitutionally protected interest without due process of law." *Id.* at 126. Third, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions." *Id.* at 125. Under any of these theories, the plaintiffs must, as a threshold matter, allege a government deprivation of life, liberty, or property. *See Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998); *Hufford v. McEnaney*, 249 F.3d 1142, 1150 (9th Cir. 2001).

Allegations of negligence are not sufficient to demonstrate a deprivation of due process. *Daniels v. Williams*, 474 U.S. 327, 330 (1986) ("[W]e should not open the federal courts to lawsuits where there has been no affirmative abuse of power.") (internal citation omitted). In addition, a government official's unpredictable and unauthorized deprivation of a liberty interest, even if intentional, does not violate procedural due process if the state provides an adequate post-deprivation remedy. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Zinermon*, 494 U.S. at 132. In such a case, "the very nature of the deprivation" renders pre-deprivation process impossible because the state cannot anticipate the random and unauthorized acts of its officials. *Zinermon*, 494 U.S. at 137 (citing *Parrott v. Taylor*, 451 U.S. 527, 540 (1981)).

Here, although Jones focuses on the substantive and procedural due process claims in his motion to dismiss, in a § 1983 suit for damages, when a court can analyze a plaintiff's claim under an

"explicit textual source of rights in the Constitution," the court "should not resort to the more subjective standard of substantive due process." *Hufford*, 249 F.3d at 1151 (internal citation omitted). Simmons asserts that the failure of the communication system deprived him of his Sixth Amendment right to counsel. I cannot discern how Simmons was deprived of counsel when no court proceeding actually took place. Moreover, it was the court's, not Jones', decision to reschedule the hearing rather than have Simmons transported to the courtroom. In addition, no procedural due process violation presents itself because Simmons had a post-deprivation remedy: a rescheduled arraignment hearing. Therefore, the Third Claim for Relief against Jones should be dismissed with prejudice.

e. Monell Liability (Jefferson County)

In *Monell v. Department of Social Services*, the Supreme Court held that municipalities are "persons" subject to damages liability under § 1983 only where "action pursuant to official municipal policy of some nature causes a constitutional tort." 436 U.S. 658, 690 (1978). "[A] municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.* Thus, to impose liability on a local governmental entity for failing to act to preserve constitutional rights, a § 1983 plaintiff must establish: "(1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy 'amounts to deliberate indifference' to the plaintiffs constitutional right; and (4) that the policy is the "moving force behind the constitutional

violation."" *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992); *see also King County v. Rasmussen*, 299 F.3d 1077, 1090 (9th Cir. 2002); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

Here, the Third Claim for Relief should be dismissed against Jefferson County because Simmons has not alleged that the failure of the electronic communication system at his October 6 arraignment was the result of an official policy or custom. Moreover, even if Simmons alleged the existence of a county policy, he cannot establish that it deprived him of a constitutional right. As noted above, he was not deprived of his right to counsel and, even if he was deprived of that right, the court provided a post-deprivation remedy. Therefore, the Third Claim for Relief should be dismissed against Jefferson County with prejudice.

D. Merits of the Federal Habeas Claim

The state seeks to dismiss Simmons' federal habeas claim on procedural grounds. The state asserts that Simmons must bring his action solely under 28 U.S.C. § 2241. In addition, the state argues that Simmons failed to identify the respondent who exercises custody and control over him.

I rejected the state's arguments in my ruling on Simmons' motion for preliminary injunction. Therefore, defendant's motion to dismiss Simmons' federal habeas petition should be denied. I note, however, that my ruling on the motion for preliminary injunction rejected Simmons' habeas

claim that the current criminal prosecution violates his federal constitutional right to be free from double jeopardy. Judge Mosman upheld that ruling in his opinion and order. As a result, Simmons cannot seek habeas relief on double jeopardy grounds. Simmons' substantive due process ground for habeas remains.

II. State Law Claims

A. Eleventh Amendment Immunity

Under the Eleventh Amendment, a state and state agencies are immune from suit under state or federal law by private parties in federal court absent a valid congressional abrogation of that immunity or an express waiver by the state. *Graham*, 473 U.S. at 167 n.14. A plaintiff can overcome that immunity only if the plaintiff pursues an official-capacity action against a state officer for injunctive relief; or sues the state officer in his or her individual capacity. *Id.* at 166- 167. In addition, while violations of 42 U.S.C. §§ 1983 or 1985(3) cannot be immunized by state law, *Howlett v. Rose*, 496 U.S. 356, 376 (1990), "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity." *Martinez v. Cal.*, 444 U.S. 277,282 n.5 (1980).

Under the Oregon Tort Claims Act, a plaintiff who sues over a state officer's tortious conduct must name the State of Oregon - not the individual officer - as the defendant. Or. Rev. Stat. § 30.265(1) (2007); *Lee v. Snake River Carr. Inst.*, No. 04-875, 2004 U.S. Dist. LEXIS 13687, at *6 (D. Or. July 13, 2004); *Demaray v. Dep't of Envtl. Quality*, 127 Or. App. 494,

502, 873 P.2d 403 (1994). The enactment of the Oregon Tort Claims Act did not waive Oregon's privileges under the Eleventh Amendment. *See, e.g., Dillard v. Sanchez*, No. 06-3095, 2007 U.S. Dist. LEXIS 26234, at * 12 (D. Or. April 5, 2007). Thus, the Eleventh Amendment bars the state law claims against the State of Oregon and those claims should therefore be dismissed without prejudice to Simmons' right to pursue those claims in state court.

A district attorney is a state officer such that, under the Oregon Tort Claims Act, the plaintiff must name the State of Oregon as the defendant to answer for a district attorney's actions. *See, e.g., Dotson v. Lane County Dist. Attys. Office*, No. 05-6004, 2005 U.S. Dist. LEXIS 43847 at *3 (D. Or. May 19, 2005) The act does, however, allow a plaintiff to name an individual state officer as a defendant if the tortious conduct occurred outside the scope of the officer's duties or employment. Or. Rev. Stat. § 30.265(1); *Dillard*, 2007 U.S. Dist. LEXIS at * 11-13. "For an act to fall within the scope of employment, it must be of a kind which the employer was hired to perform, must have occurred within authorized time and space, and the employee must have been motivated, at least in part, by a purpose to serve [the employer]."*Haase v. Eugene*, 85 Or. App.107, 110-111,735 P.2d 1258 (1987).

Here, although Simmons alleges in his state law claims against the prosecutors that they "acted intentionally, willfully, maliciously and with the intent to injure and harm," his factual allegations against them point to acts that occurred within the scope of their employment. Specifically, portions of his claims are based on the fact that Deuel and

LeRiche failed to read the indictment before they initiated the original felony prosecution - not that they acted to serve their own ends. In addition, his factual allegations against Myers, Tuttle, Tweedt merely assert that they assumed responsibility for the current misdemeanor prosecution. As a result, under the Oregon Tort Claims Act, the State of Oregon is the proper party for the state law claims against Deuel, LeRiche, Myers, Tuttle and Tweedt. Therefore, because Oregon has not waived its Eleventh Amendment immunity from suit in federal court, Simmons' Seventh, Eighth, Ninth and Tenth Claims for Relief should be dismissed without prejudice to Simmons' right to pursue those claims in state court.

B. Supplemental Jurisdiction

Supplemental jurisdiction exists where state law claims are so related to claims over which the court has federal question jurisdiction that they form part of the same case or controversy. 28 U.S.C. § 1367(a). Claims form part of the same case or controversy if they "derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). A federal district court with power to hear state law claims has discretion to keep, or decline to keep, them under the conditions set out in 28 U.S.C. § 1367(c). *Acri v. Varian Assocs.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc).

Here, no one disputes that the claims in this case arise out of a common nucleus of operative fact: the prosecution of Simmons after the grand jury returned the not true bill. Due to Eleventh Amendment immunity and the constraints of the

Oregon Tort Claims Act, however, Simmons may only bring his state law claims against LeRiche, Tuttle and Tweedt and the State of Oregon in state court. Thus, I consider whether to exercise supplemental jurisdiction over the state law claims against the remaining defendants, Alexander, Kimble, Jones, and Jefferson County.[9]

The Ninth Circuit uses a two-part analysis to determine whether it is appropriate for a court to exercise its discretion to decline supplemental jurisdiction. *See Acri*, 114 F.3d at 1001 First, a court must look to whether the case falls under one of the four enumerated circumstances under 1367(c). *Executive Software N Am. v. United States Dist. Court*, 24 F.3d 1545, 1558 (9th Cir.1994) *overruled on other grounds by Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1092 (9th Cir. 2008). Second, the court must consider whether its decision to decline jurisdiction serves the values of economy, convenience, fairness and comity. *Acri*, 114 F.3d at 1001.

1. Predominance of State Law Claims

Under § 1367(c)(2) a court may decline supplemental jurisdiction where the state law claims

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[9] The Oregon Tort Claims Act also applies to municipalities. *Haase v. Eugene*, 85 Or. App. 107, 109, 735 P.2d 1258 (1987). Thus, as counsel for Jones and Jefferson County asserted at oral argument, Jefferson County, not Sheriff Jones, is the proper defendant in Simmons' state law claims against the county if Jones was acting within the scope of his employment. *See* Or. Rev. Stat. § 30.265(1).

substantially predominate over the claims that invoke the district court's original jurisdiction. 28U.S.C. § 1367(c)(2). Courts inquire whether the state issues substantially predominate "in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought." *Gibbs*, 383 U.S. at 726-27.

Here, the state claims predominate over the remaining federal claims. While Simmons' habeas claim remains, it raises only one issue - whether the current prosecution violates his right to substantive due process - and involves injunctive relief as its sole possible remedy. In addition, I have dismissed all the federal §§ 1983 and 1985 claims, with leave to amend only the First and Third Claims for Relief against Deuel. The potential claim against Deuel requires proof regarding the management of the Jefferson County District Attorney's Office and whether improper management led to constitutional deprivations. The state law claims, on the other hand, involve proof regarding the individual actions and motivations of Kimble, Alexander, Jones and the five state prosecutors. In addition, the state claims involve legal issues, including state immunities, negligence and intentional torts, that do not arise in the remaining federal claims. Thus, the limited scope of the federal habeas claim and the apparent weakness of the remaining § 1983 claims leads the Court to conclude that the state law issues predominate in this case.

2. Economy

In some cases a court may conclude there has already been so much judicial energy expended in the action to justify retention of jurisdiction over the supplemental claims. *Schneider v. TRW, Inc.*, 938 F.2d 986, 994 (9th Cir. 1991). However, my efforts in this case to date have focused on Simmons' federal claims. The case remains in the early stages. While I have reviewed the defendants' briefs and heard their arguments to dismiss the state law claims, I have not conducted an in-depth analysis of the state issues and have issued no ruling on the state law claims. I note, however, that my review to date leaves me with serious doubt concerning the viability of Simmons' state law claims, particularly with regard to the potential liability of the prosecutors and whether the facts alleged support the claims for false imprisonment and intentional infliction of emotional distress.

3. Convenience and Fairness

The value of convenience would be better accommodated by remanding the case to Jefferson County. Defendants Jones, Kimble, Alexander, LeRiche and Deuel presumably live in or near that county because they are employed there. Defendants Tuttle and Tweedt are engaged in Simmons' misdemeanor prosecution there. Simmons resides in Texas, so it will be no more inconvenient for him to travel to Jefferson County to try the case than it would be to try it in Portland.[10]

---

[10] Simmons has not alleged diversity jurisdiction. I leave it to him to decide, in light of the fact that the claims against

Moreover, a state forum will provide just as fair a proceeding as a federal one. I recognize that Simmons may have fairness concerns because this case involves the Jefferson County Circuit Court to the extent that the judges who presided over his arraignment and sentencing in the felony prosecution did not notice the not true bill. Simmons, however, successfully sought a recusal on those grounds in his pending misdemeanor prosecution. Thus, Simmons may seek a recusal should those concerns arise in his civil case.

4. Comity

The concept of comity reflects "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 45. Thus, as a matter of comity, courts should avoid needless decisions of state law. *Gibbs*, 383 U.S. at 726. Here, only a federal habeas claim remains in this case unless Simmons can properly allege supervisory liability in his § 1983 claims against Deuel. Comity weighs in favor of remand.

When the balance of judicial economy, convenience, fairness, and comity indicates that a

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[10] Deuel, LeRiche, Myers, Tuttle and Tweedt must be brought in state court, whether to amend his complaint to invoke diversity jurisdiction over his state law claims against the remaining defendants.

case properly belongs in state court, as when the federal claims drop out of the lawsuit in its early stages, or state claims predominate, the federal court should decline the exercise of jurisdiction. *Executive Software No. America, Inc*, 24 F.3d at 1552. In this case, the values of judicial economy, convenience, fairness, and comity are better served by declining supplemental jurisdiction. Accordingly, the remaining state law claims should be dismissed without prejudice to Simmons' right to pursue them in state court.

CONCLUSION

State Defendants' Rule 12 Motion to Dismiss (#23), Jones and Jefferson County's Rule 12 Motion to Dismiss (#27), Kimble's Rule 12 Motion to Dismiss (#30) and Defendant Alexander's Rule 12 Motion to Dismiss (#32) should be granted in part and denied in part as follows. Simmons' First Claim for Relief should be dismissed with prejudice as to LeRiche, Myers, Tuttle and Tweedt and with leave to amend against Deuel. Simmons' Second Claim for Relief should be dismissed with prejudice. Simmons' Third Claim for Relief should be dismissed with prejudice as to Jones, Jefferson County, Kimble, LeRiche and the State of Oregon and with leave to amend against Deuel. Simmons' Fourth, Fifth and Sixth Claims for Relief should dismissed with leave to file in state court. Simmons' Seventh and Eighth Claims for Relief should be dismissed with prejudice as to Deuel and LeRiche and with leave to file against the State of Oregon in state court. Simmons' Ninth Claim for Relief should be dismissed with prejudice as to Deuel and LeRiche and with leave to file against Kimble, Jefferson County, Jones and the State of Oregon in

state court. Simmons' Tenth Claim for Relief should be dismissed with prejudice as to Deuel, LeRiche, Myers, Tuttle and Tweedt with leave to file against Alexander, Jefferson County, Jones, Kimble and the State of Oregon in state court. The state defendants' motion to dismiss the Eleventh Claim for Relief (petition for habeas corpus) should be denied.

Defendant Kimble's Motion to Strike (#30) and Defendant Alexander's Motion to Strike (#32) are denied as moot. State Defendants' Motion to Stay Discovery (#21), Defendants Jones and Jefferson County's Motion to Stay Discovery (#26), Defendant Alexander's Motion to Stay Discovery (#34) and Defendant Kimble's Motion to Stay Discovery (#35) are denied as moot.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due October 8, 2008. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date. If objections are filed, a response to the objections is due fourteen days after the date the objections are filed and the review of the Findings and Recommendation will go under advisement on that date.

Dated this 24th day of September, 2008.

/s/ Paul Papak
Honorable Paul Papak
United States Magistrate Judge

APPENDIX 5

Fourth Amended Information dated February 4, 2009

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JEFFERSON

STATE OF OREGON,
Plaintiff,

Case No. MI06-0538

v.

FOURTH AMENDED INFORMATION

DAVID LEE SIMMONS,
Defendant.

The defendant is accused by Steven Leriche, District Attorney for the County of Jefferson, by this Information, of the crime(s) of:

Count 1: **HARASSMENT** (B Misdemeanor; ORS 166.065(1)(b)) FPC#: 78371702 committed as follows:

COUNT 1

The defendant, on or between September 19,2006 and September 26,2006, in Jefferson County, Oregon, did unlawfully and intentionally harass or annoy Nicole L. Oltman, by subjecting her to alarm by conveying the false report that the defendant intended to kill himself, reasonably knowing at the time he conveyed the report that it would cause alarm.
Dated this 4th day of February, 2009.

STEVEN LERICHE
DISTRICT ATTORNEY FOR JEFFERSON COUNTY, OREGON

BY: s/ DARIN E. TWEEDT
Special Deputy District Attorney
Oregon State Bar No. 924869

Arresting Agency Case #: MSP 061233
District Attorney Case #: 06-790

IDENTIFIERS: W/M Ht: 511 Wt: 150 Hair: BLN
DOB: 05/01/1988 Eyes: HAZ

APPENDIX 6

Amended Information

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JEFFERSON

STATE OF OREGON,
Plaintiff,

v.

DAVID LEE SIMMONS,
Defendant.

Case No. MI06-0538

AMENDED
INFORMATION

The defendant is accused by Peter L. Deuel, District Attorney for the County of Jefferson, by this Information, of the crime(s) of:

Count 1: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor; ORS 163.415) FPC#: 78371702

Count 2: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor; DRS 163.415) FPC#: 78371702

Count 3: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor; ORS 163.415) FPC#: 78371702

Count 4: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor; ORS 163.415) FPC#: 78371702

Count 5: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor: ORS 163.415) FPC#: 78371702

Count 6: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor: ORS 163.415) FPC#: 78371702

Count 7: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor: ORS 163.415) FPC#: 78371702

Count 8: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor: ORS 163.415) FPC#: 78371702

Count 9: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor: ORS 163.415) FPC#: 78371702

Count 10: SEXUAL ABUSE IN THE THIRD DEGREE (A Misdemeanor: ORS 163.415) FPC#: 78371702

Committed as follows:

COUNT 1

The defendant, on or between September 25,2005 to September 24,2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by causing the said Nicole 1. Oltman to touch the defendant's penis, a sexual or intimate part of the defendant, the said Nicole L. Oltman not consenting thereto; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the garage located at the residence of Judy Parsons on the comer of 1 s and "F" Street, Madras, Oregon.

COUNT 2

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by touching her vagina, a sexual or intimate part of Nicole L. Oltman, the said Nicole L. Oltman not consenting thereto; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the garage located at the residence of Judy Parsons on the corner of 1st , and "F" Street, Madras, Oregon.

COUNT 3

The defendant, on or between September 25,2005 to September 24,2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by causing the said Nicole L. Oltman to touch the defendant's penis, a sexual or intimate part of the defendant, the said Nicole 1. Oltman not consenting thereto; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near Hoffy's Motel.

COUNT 4

The defendant, on or between September 25,2005 to September 24,2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by touching her vagina, a sexual or intimate

part of Nicole L. Oltman, the said Nicole L. Oltman not consenting thereto; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near Hoffy's Motel.

COUNT 5

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by causing the said Nicole L. Oltman to touch the defendant's penis, a sexual or intimate part of the defendant, the said Nicole L. Oltman not consenting thereto; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the residence of April Robertson.

COUNT 6

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by touching her vagina, a sexual or intimate part of Nicole L. Oltman, the said Nicole L. Oltman not consenting thereto; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the residence of April Robertson.

COUNT 7

The defendant, on or between September 25,2005 to September 24,2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by causing the said Nicole L. Oltman to touch the defendant's penis, a sexual or intimate part of the defendant, the said Nicole 1. Oltman not consenting thereto; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the residence of Nicole Oltman.

COUNT 8

The defendant, on or between September 25,2005 to September 24,2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by touching her vagina, a sexual or intimate part of Nicole L. Oltman, the said Nicole L. Oltman not consenting thereto; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the residence of Nicole Oltman.

COUNT 9

The defendant, on or between January 1,2006 to January 31,2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by causing the said Nicole L. Oltman to touch the defendant's penis, a sexual or intimate part of the defendant, the said Nicole L. Oltman not consenting thereto; contrary to statute

and against the peace and dignity of the State of Oregon.

COUNT 40

The defendant, on or between September 25,2005 to September 24,2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman to sexual contact by causing the said Nicole L. Oltman to touch the defendant's penis, a sexual or intimate part of the defendant, the said Nicole L. Oltman not consenting thereto; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near Hoffy's Motel.

Dated this _ ___ __ day of August, 2007.
PETER I. DEUEL
DISTRICT ATTORNEY FOR JEFFERSON COUNTY, OREGON

BY: _____
STEPHANIE J. TUTTLE
Special Deputy District Attorney
Oregon State Bar No. 93446

Arresting Agency Case #: MSP 061233
District Attorney Case #: 06-790

IDENTIFIERS: W/M Ht: 511 Wt: 150 Hair: BLN
DOB: 05/01/1988 Eyes: HAZ

APPENDIX 7

Judge Thompson's Letter Ruling

Creek County Courthouse
300 NE 3rd St.
Prineville, OR 97754-1990
(541) 447-6541-
Fax (541) 447-5116
Reply to ( )

Jefferson County
Courthouse
75 SE "C" Street, Suite C
Madras, OR 97741-1750
(541) 475-3317 -
Fax (541) 475-3421
Reply to ( )

Judge Gary S. Thompson Judge George W. Neilson Judge Daniel J. Ahern
Presiding Judge

Twenty-Second Judicial District Trial Courts

May 3, 2007

Mr. Peter L. Deuel
Deputy District Attorney
75 SE C Street
Madras, OR 97741

Mr. Steven M. Richkind
Attorney at Law
P O Box 370
Sandy, OR 97055

Re: State v. David Lee Simmons
Jefferson Circuit Court Case No. MI 060538

Counsel:

This was before the Court on a Motion to Dismiss on grounds of former jeopardy interposed by the Defendant Mr. Simmons on February 9, 2007. The facts are as follows; that on around September 28, 2006, Mr. Simmons was arraigned on a District Attorneys's Information charging him with four counts of Rape in the Third Degree and two counts of Sodomy in the Third Degree. The matter was presented to the Jefferson County Grand Jury on October 5, 2006 for which the Jefferson County Grand Jury returned a not true bill on all six counts, This fact seems to have not been noticed by the deputy district attorney who presented the case, Mr. LeRiche, the judge who arraigned him on October 6, 2006, the Honorable Daniel Ahem, defense counsel Jennifer Kimble and the judge who ultimately took his plea and sentenced him, Judge Neilson. An offer was made on October 10, 2006 to Ms. Kimble and on October 10, the Defendant Mr. Simmons plead guilty-to two counts in the indictment in front of the Honorable George W. Neilson. He was released from custody and was required to return to court on October 19, 2006. He returned to court and was sentenced at that time and placed back into custody to complete his thirty day jail term as a part of the plea negotiations. He was apparently released from j ail around October 31, 2006 and by that time the district attorney, defense counsel and Judge Neilson had discovered that he had plead guilty to two counts on a not true bill indictment. As a consequence, Judge Neilson entered an order on November 1, 2006 vacating the Judgments of Conviction on Sentencing

and all accompanying orders and dismissing the indictment. Subsequent to that time on November 30, 2006, Mr. LeRiche filed a District Attorney's Information charging the Defendant with four counts of Contributing to the Sexual Delinquency of a Minor and two counts of Sexual Abuse in the Third Degree. The six counts that are in the new information mirror image the times and places in the six counts in the indictment.

This case is different in many of the cases cited by the State in that the original arraignment on the initial case 06FE0169, the pleas to the two counts in 06FE0169 were in front of a court that had jurisdiction to take the plea except for the fact that the grand jury returned a not true bill. It is clear to this Court that in entering a plea and being sentenced on charges which were in essence dismissed by the grand jury, that any entry of a plea and any sentencing is a void act. It is clear that the arraignment following the not true bill indictment, the change of plea was ' pursuant to a plea offer and negotiations between the district attorney's office and defense counsel and the sentencing was pursuant to that plea offer and negotiations. Unlike many of the other cases where the defendant has attempted to initiate a proceeding in a minor court where an accusatory instrument had not been filed or a minor charge had been filed or the court did not, have jurisdiction, such is not the case in this case in point.

Nevertheless, ORS 131.505 talks about a person being prosecuted for an offense when the person is charged with an accusatory instrument filed in any court in this state or any court in applicable subdivision of the state when by the action either

terminates in a conviction upon a plea of guilty except as provided in ORS 131.525, (2). This case terminated in a plea of guilty on a void proceeding on a not true bill. ORS 131.525, (l b), the trial court finds the determination, other than by judgment of acquittal is necessary because (A) it is physically impossible to proceed with the trial and conformity of the law or, (B) there is a legal defect in the proceeding that would make any judgment entered upon the verdict reversible as a matter of law or, (C) when the former prosecution occurred in a court which lacked jurisdiction over the defendant or the offense. In (2) of 131.525 it indicates a plea of guilty resulting in judgment is not a bar under ORS 131.515 (2) to a subsequent prosecution under an accusatory instrument which was filed no later than 30 days after the entry of the guilty plea. Subsequent prosecution in this case was proceeded 30 days after the plea of guilty on a void plea.

One of the cases cited by the State is St. v. Paris, 76 N.M. 291, 414 P2nd 512 (1966) in which a defendant had served over a year on a sentence on a larceny conviction before being released on a habeas corpus petition. The court in that case indicated that retrial and conviction in the same offense was not improper since the habeas corpus proceeding determines the original proceeding was void for lack of jurisdiction of the court.

The not true bill indictment by the grand jury resulted in defacto dismissal of the six felony charges that were filed against Mr. Simmons. The trial level court was without jurisdiction to proceed on a plea negotiation and sentencing on any of those six felony

charges and any action by the trial level court was void because of that. Although it may seem unfair, and may fail the smell test as suggested by Mr. Richkind, this Court can find no case or constitutional provision that would prohibit the State from trying this Defendant on any of the six misdemeanors currently charged in the accusatory instrument.

The Court denies the Defendant's Motion to Dismiss on the basis of former jeopardy and orders the clerk set the case for a pre trial conference.

Sincerely yours,

s/ Gary S. Thompson
Circuit Court Judge

APPENDIX 8

Misdemeanor Information

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JEFFERSON

STATE OF OREGON,
Plaintiff,

INFORMATION

v.

Court No. MI060538

DAVID LEE SIMMONS,
Defendant.

The defendant is accused by Peter L. Deuel, District Attorney for the County of Jefferson, by this Information, of the crime(s) of:

Count 1: CONTRIBUTING TO THE SEXUAL DELINQUENCY OF A MINOR (FSG=; A Misdemeanor; ORS 163.435) FPC#: 78371702

Count 2: CONTRIBUTING TO THE SEXUAL DELINQUENCY OF A MINOR (FSG=; A Misdemeanor; ORS 163.435) FPC#: 78371702

Count 3: CONTRIBUTING TO THE SEXUAL DELINQUENCY.OF A MINOR (FSG=; A Misdemeanor; ORS 163.435) FPC#: 78371702

Count 4: CONTRIBUTING TO THE SEXUAL DELINQUENCY OF A MINOR (FSG=; A Misdemeanor; ORS 163.435) FPC#: 78371702

Count 5: SEXUAL ABUSE IN THE THIRD DEGREE (FSG=; A Misdemeanor; ORS 163.415) FPC#: 78371702

County 6: SEXUAL ABUSE IN THE THIRD DEGREE (FSG=; A Misdemeanor; DRS 163.415) FPC#: 78371702

Committed as follows:

COUNT 1

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, being a male over the age of eighteen years, did unlawfully and knowingly engage in sexual intercourse with Nicole L. Oltman, a female between the ages of 14 and 15 years; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the garage located at the residence of Judy Parsons on the comer of 1st and "F" Street. Madras, Oregon.

COUNT 2

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, being a male over the age of eighteen years, did unlawfully and knowingly engage in sexual intercourse with Nicole L. Oltman, a female between

the ages of 14 and 15 years; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near Hoffy's Motel.

COUNT 3

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, being a male over the age of eighteen years, did unlawfully and knowingly engage in sexual Intercourse with Nicole L. Oltman, a female between the ages of 14 and 15 years; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the residence of April Robertson.

COUNT 4

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, being a male over the age of eighteen years, did unlawfully and knowingly engage in sexual intercourse with Nicole L Oltman, a female between the ages of 14 and 15 years; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the residence of Nicole Oltman.

COUNT 5

The defendant, on or about the month of January 2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman, a person of the age of 14 years, to sexual contact by causing the said Nicole L Oltman to touch the

defendant's penis, a sexual or intimate part of the defendant; contrary to statute and against the peace and dignity of the State of Oregon.

COUNT 6

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, did unlawfully and knowingly subject Nicole L. Oltman, a person between 14 and 15 years. of age, to sexual contact by causing the said Nicole L. Oltman to touch the defendant's penis, a sexual or intimate part of the defendant; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near Hoffy's Motel.

DATED: 30 November 2006
PETER L. DEUEL
DISRICT ATTORNEY FOR JEFFERSON COUNTY, OREGON

BY: s/ Steven F. LeRiche
Deputy District Attorney
Oregon State Bar No. 98007

Arresting Agency Case #: MSP 061233
District Attorney Case #: 06-790
DA Document ID #: 1

IDENTIFIERS: W/M Ht: 511 Wt: 150 Hair: BLN
DOB: 05/01/1988 Eyes: HAZ

APPENDIX 9

Judgment

In the Circuit Court of the State of Oregon
for Jefferson County

STATE OF OREGON,
Plaintiff,

Case No.: 06FE0169

JUDGMENT

v.

DAVID LEE SIMMONS,
Defendant.

Case File Date:
09/28/2006
District Attorney File #:
06-638

DEFENDANT
True Name: David Lee Simmon Sex: Male
Date of Birth: 05/01/88
Fingerprint Control No (FPN): 78371702

HEARING
Proceeding Date: 10/19/2006
Judge: George W Neilson
Media No.: 12:06 JB
Court Reporter: Ftr Gold

Defendant appeared in person and was not in custody. The court determined that the defendant was indigent for purposes of court-appointed counsel, and the court appointed counsel for the defendant. The defendant was represented by Attorney(s) Jennifer F Kimble, OSB Number 91337.

Plaintiff appeared by and through Steve Leriche, OSB Number 98007.

COUNT(S)
It is adjudged that the defendant has been convicted on the following count(s):

Count 2: Rape-3

Count number 2, Rape-3, ORS 163355, a Class C Felony, committed on or about 02/01/2006. Conviction is based upon a plea of Guilty on 10/10/2006.

Sentencing Guidelines
The Crime Severity Classification (CSC) on Count Number 2 is 6 and the Criminal History Classification (CHC) is I.

The court finds reason(s) for a durational departure, as stated on the record. This departure is pursuant to the following factor(s):

- Stipulation of the parties.

Probation
Defendant is sentenced to Supervised Probation for a period of 60 month(s) and shall be subject to the following conditions of probation: Defendant is ordered to pay a supervision fee.

Defendant is subject to all general conditions of probation (ORS 137.540(2)).

Furthermore, defendant is subject to the following Special Conditions of Probation (ORS 137.540(2)):

Defendant shall:

- Keep the Court advised of his/her mailing address, throughout the probationary period, and immediately notify the Court in writing of any change in address.
- Obey all municipal, county, state and federal laws.
- Pay fines, fees and restitution as ordered.
- Report immediately following sentencing or release from custody to Jefferson County Community Corrections office at 75 SE "C" Street, Ste.D, Madras, OR 97741. Phone: 541-475-6145.
- Remain in the State of Oregon until written permission to leave is granted by the Department of Corrections or Court.
- Change neither employment nor residence without prior permission from the Department of Corrections, probation office or Court.
- If physically able, find and maintain gainful full-time employment, approved schooling or a full-time combination of both.
- Enter into, satisfactorily participate in, and successfully complete all conditions of the approved sex offender treatment program as directed by the supervising officer. Abide by all treatment program requirements. Consent to and cooperate with any plan deemed necessary by the supervising officer or therapist to maintain and monitor offense-free behavior. Any program begun prior to

probation inception may not be accepted by the supervising officer and the supervising officer can direct that another approved program be entered and completed. Do not transfer to a new treatment program once one is started unless approved by the supervising officer. Be financially responsible for all treatment costs.

- Not possess or view images, magazines, motion pictures, video recordings, audio recordings, photographs, computer files, generated images, internet or telephonic communication used for the purposes of sexual arousal. Do not enter any place of business displaying live adult entertainment, i.e., adult book stores, sex shops, massage parlors, strip bars, topless bars, peep shows.
- Not access the Internet.
- Have no direct or indirect contact with any person under the age of 18 without the prior written consent of the defendant's supervising officer or the court. Do not frequent places primarily for the enjoyment of persons under age 18 or where children are likely to congregate, including but not limited to: playgrounds, arcades, child care agencies, amusement parks, zoos, circus.
- Have no direct or indirect contact with any female under 18 years of age, unless authorized by the court or probation officer.

- Have no direct or indirect contact with any male under 18 years of age, unless authorized by the court or probation officer.
- Not be involved in any organizations which would place defendant in contact with persons less than eighteen (18) years of age, i.e., Boy Scouts, Girl Scouts, 4-H, Big Brother or Big Sister Program, Sunday School teaching, etc.
- Be financially responsible for any and all counseling, therapy treatment or medical costs related to the offense incurred by the victim, spouse of the victim, or parent of the victim.
- Consent to and cooperate with plethysmographic assessment and/or Abel screen assessment when deemed necessary by the therapist or the supervising officer. Be financially responsible for the assessment fee.
- Consent to the sharing of privileged assessment and treatment information between public agencies, agents and persons who are deemed essential in assessing, monitoring and administering treatment for sexual deviancy problems.
- Not initiate any direct or indirect contact with the victim(s) Nicole Oltman, Do not enter victim's property or residence for any reason without prior written permission of defendant's supervising officer or the court.
- Submit blood or buccal sample and thumbprint pursuant to ORS 137.076.

- Submit to testing for HIV and other communicable diseases pursuant to ORS 135.139.
- Register as a sex. offender pursuant to Oregon Revised Statutes.
- No access to the Internet unless approved by Probation Officer.

Jail as a Condition of Probation
Be confined to the jail for 30 day(s). Defendant is to report to Jefferson County Supervisory Authority at the Jefferson County Jail by 10/19/2006 at 03:00 PM. Defendant may receive credit for time served Defendant may be considered, either by the executing or releasing authority or by the supervisory authority, for any form of temporary leave, reduction in sentence, work release, alternative incarceration program or program of conditional or supervised release as specified in ORS 137.750 - 137.752, and defendant shall pay any required per diem fees.

Count 5: Sodomy-3

Count number 5, Sodomy-3, ORS 163385, a Class C Felony, committed on or about 01/01/2006.
Conviction is based upon a plea of Guilty on 10/10/2006.

Sentencing Guidelines
The Crime Severity Classification (CSC) on Count Number 5 is 6 and the Criminal History Classification (CHC) is D.

The court finds reason(s) for a dispositional departure, as stated on the record. This

departure is pursuant to the following factor(s):

- Stipulation of the parties.
- Departure downward to probation.

Probation

Defendant is sentenced to Supervised Probation for a period of 60 month(s) and shall be subject to the following conditions of probation: Pursuant to the sentencing guidelines grid, defendant is subject to 180 sanction units with jail units. Defendant is ordered to pay a supervision fee.

Defendant is subject to all general conditions of probation (ORS 137.540).

Furthermore, defendant is subject to the following Special Conditions of Probation (ORS 137.540(2)):

Defendant shall:

- Comply with all terms and conditions of probation in case number(s): Count II.
- Report, in person, to Jefferson County Community Corrections at 75 SE "C" Street, Ste. D, Madras, OR 97741. Phone: 541-475-6145. Defendant shall perform 30 day(s) of community service/work crew. Community service/work crew to be completed by 04/0112007. Pay any required fees.
- Submit blood or buccal sample and thumbprint pursuant to ORS 137.076.
- Submit to testing for HIV and other communicable diseases pursuant to ORS 135.139.

- Register as a sex offender pursuant to Oregon Revised Statutes.

Monetary Terms
Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Chapter 163 Asmt	$500.00			$500.00
Total	$500.00			$500.00

COUNTS DISPOSED WITH NO CONVICTION
Count # 1 is Dismissed.
Count # 3 is Dismissed.
Count # 4 is Dismissed.
Count # 6 is Dismissed.

MONEY AWARD
Judgment Creditor: State of Oregon
Judgment Debtor: David Lee Simmons
Defendant is ordered to pay the following monetary totals, including restitution or compensatory fine amounts stated above, which are listed in the Money Award portion of this document:

Type	Actual Owed
Chapter 163 Asmt	$500.00
Total	$500.00

The court may increase the total amount owed by adding collection fees and other assessments. These

fees and assessments may be added without further notice to the defendant and without further court order.

Subject to amendment of a judgment under ORS 137.107, money required to be paid as a condition of probation remains payable after revocation of probation only if the amount is included in the money award portion of the judgment document, even if the amount is referred to in other parts of the judgment document.

Any financial obligation(s) for conviction(s) of a violation, which is included in the Money Award, creates a judgment lien.

Payment Schedule
Payment of the fines, fees, assessments, and/or attorney's fees noted in this and any subsequent Money Award shall be made as follows:

All financial obligations must be paid by 04/01/2007.

Payable to State of Oregon at:

Jefferson County Courthouse
75 SE C ST. - SUITE C
Madras, OR 97741-1750

Dated the 19th day of October, 2006

Signed: s/ George W Neilson

APPENDIX 10

The Not True Bill

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JEFFERSON

STATE OF OREGON,
Plaintiff, INDICTMENT

v. Court No. 06FE-0169

DAVID LEE SIMMONS,
Defendant.

The Defendant is accused by the Grand Jury for JEFFERSON County of the following offenses:

Count 1: RAPE IN THE THIRD DEGREE (FSG=6;, C Felony. ORS 163.355) FPC#: 78371702

County 2: RAPE IN THE THIRD DEGREE (FSG=6; C Felony; ORS 163.355) FPC#: 18371702

Count 3: RAPE IN THE THIRD DEGREE (FSG--6; C Felony; ORS 163.355) FPC#: 78371702

County 4: RAPE IN THE THIRD DEGREE (FSG=6; C Felony; ORS 163.355) FPC#: 78371702

County 5: SODOMY IN THE THIRD DEGREE (FSG=6; C Felony; DRS 163.385) FPC#. 78371702

Count 6: SODOMY IN THE THIRD DEGREE'(FSG=6; C Felony; ORS, 163.385) FPC#: 78371702

committed as follows:

COUNT 1

The defendant, on or between September 25. 2005 to September 24. 2006. in Jefferson County. Oregon, did unlawfully and knowingly engage in sexual intercourse with Nicole L. Oltman, a child under the age of sixteen years; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the garage located at the residence of Judy Parsons on the corner of 1st and "F" Street, Madras, Oregon.

COUNT 2

The defendant. on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, did unlawfully and knowingly engage in sexual Intercourse with Nicole L Oltman, a child under the age of sixteen years; contrary to statute and against the peace and dignity of the State of Oregon.

The Slate further alleges that this criminal episode occurred at or near Hoffy's Motel.

COUNT 3

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, did unlawfully and knowingly engage In sexual intercourse with Nicole L. Oltman, a child under the age of sixteen years: contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near the residence of April Robinson.

COUNT 4

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County, Oregon, did unlawfully and knowingly engage in sexual Intercourse with Nicole L Oltman a child under the age of sixteen years; contrary to statute and against the peace and dignity of the state of Oregon.

The state further alleges that this criminal episode occurred at or near the residence of Nicole Oltman.

COUNT 5

The defendant, on or about the month of January 2006, in Jefferson County, Oregon, did unlawfully and knowingly engage in deviate sexual intercourse with Nicole Oltman, a person under the age of sixteen years; contrary to statute and against the peace and dignity of the State of Oregon, and

COUNT 6

The defendant, on or between September 25, 2005 to September 24, 2006, in Jefferson County,

Oregon, did unlawfully and knowingly engage in deviate sexual intercourse with Nicole Oltman, a person under the age of sixteen years; contrary to statute and against the peace and dignity of the State of Oregon.

The state further alleges that this criminal episode occurred at or near Hoffy's Motel.

WITNESSES EXAMINED
BEFORE THE GRAND
JURY IN PERSON:
Tanner Stanfill
Nicole Oltman
Nicole Parsons
Danny Parsons

A TRUE BILL
__X__ NOT A TRUE BILL

s/ Grand Jury Foreperson

WITNESSES EXAMINED
BEFORE THE GRAND
JURY BY REPORT:

PETER L. DEUEL
DISTRICT ATTORNEY
By:
s/STEVEN F. LERICHE
Deputy District Attorney
Oregon State Bar No. 98007
DATE: 10/5/06

A warrant to be issued with Security in the amount of
$_____
DATE: _ _ _ _

_____
Judge

CLERK'S CERTIFICATE
I hereby certify this copy to be a true, full and correct copy of the original now on record in my office.
s/ Clerk of the Circuit Court
by: _____ _ _ _

Deputy

Arresting Case #: MSP 061233

District Attorney Case #: 06-638
DA Document ID#: 4

IDENTIFIERS: W/M Ht: 511 Wt: 150 Hair: BLN
DOB: 05/01/1988 Eyes: HAZ